Supreme Court, U.S.
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NO.

In The
SUPREME COURT OF THE UNITED STATES

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CHRISTOPHER VENEKLASE, PAUL B. MEHL, DAROLD LARSON, NANCY EMMEL AND JESSICA UCHTMAN,
*Petitioners,*

v.

CITY OF FARGO,
*Respondent.*

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On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

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# PETITION FOR WRIT OF CERTIORARI

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May 14, 2001

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## QUESTIONS PRESENTED

In *Frisby v. Schultz*, 487 U.S. 474 (1988), this Court construed an ordinance expressly to protect picketing in residential areas except for "focused picketing taking place solely in front of a particular residence." *Id.* at 483. Relying on *Frisby* and carefully observing it under a virtually identical ordinance, Petitioners conducted a residential prayer walk in Fargo, North Dakota covering six to eight houses. The Eighth Circuit nonetheless held in this case that the City of Fargo could criminalize Petitioners' prayer walk based upon a residential privacy interest, and that a walk covering even 30 or 100 houses could also be prohibited.

The following questions are presented:

1. Whether a municipality may criminalize marching up and down a residential street, with persuasive intent, in front of 30 or even 100 houses, provided only that the picket goes past one "targeted" residence in the course of the march.

2. Whether the residential privacy interest enunciated in *Frisby v. Schultz* permits Respondent to criminalize the act of walking in silent prayer on public sidewalks in a continuous route past six to eight houses.

3. Whether all grounds for municipal liability under *Monell* principles are foreclosed when police officers are entitled to qualified immunity because of uncertainty in the law surrounding an unconstitutional arrest.

4. Whether election to participate in an *en banc* proceeding by a newly appointed Court of Appeals judge, who then cast the tie-breaking vote, warrants exercise of this Court's supervisory authority, where that judge failed to disclose that his law firm had an active attorney-client relationship with the victim of the alleged crime involved in the case.

## PARTIES TO THE PROCEEDINGS

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## PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners Christopher Veneklase, Paul B. Mehl, Darold Larson, Nancy Emmel and Jessica Uchtman respectfully petition this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the Court of Appeals' holding in *Veneklase, et al. v. City of Fargo*, No. 98-2147 (February 13, 2001) (*en banc*).

## OPINIONS BELOW

The decision of the *en banc* United States Court of Appeals for the Eighth Circuit in *Veneklase, et al. v. City of Fargo*, No. 98-2147 (2001 U.S. App. LEXIS 2249), dated February 13, 2001, is not yet reported. It appears as Appendix A to the Petition. The Judgment of the *en banc* Eighth Circuit, filed February 13, 2001, appears as Appendix B.

The Eighth Circuit's Order Denying Appellants' Motion for Rehearing *En Banc* of the Memorandum and Order Concerning Plaintiff's Motion to Recuse, dated January 17, 2001, appears as Appendix C hereto; and the Order Denying Appellants' Motion for Reconsideration of Memorandum and Order Concerning Plaintiffs' Motion to Recuse, dated January 12, 2001, appears as Appendix D. These orders are unreported. Circuit Judge Bye's Memorandum and Order Concerning Plaintiffs' Motion to Recuse, dated December 13, 2000, is reported at 236 F.3d 899 (8th Cir. 2000), and appears as Appendix E. The Eighth Circuit Court of Appeals' unreported Order Vacating April 11, 2000 Submission, Announcing Participation of Hon. Kermit E. Bye and Directing Further Briefing appears as Appendix F.

The Order Granting Petition for Rehearing *En Banc,* dated February 16, 2000, is unreported, and appears as Appendix G hereto. The vacated second decision of the Eighth Circuit panel in *Veneklase v. City of Fargo*, issued December 30, 1999, is reported at 200 F.3d 1111 (8th Cir. 1999), and appears as Appendix H. The first panel opinion, which was entered on August 30, 1999, but subsequently vacated by the panel on reconsideration, is not reported and does not appear in the Appendix to this Petition. Its content is fully encompassed within the second panel opinion entered on December 30, 1999, and appears therein at pages H3-H12 of the Appendix (*see* explanatory footnote * at pages H1-H2).

The Judgment in a Civil Case issued August 26, 1997, in *Veneklase v. City of Fargo*, No. A3-93-156, by the United States District Court for the District of North Dakota (Southeastern Division), *as revised March 31, 1998 for an award of attorneys' fees and costs*, is unreported. It appears as Appendix I. The District Court's Order Granting Plaintiffs' Motion for Partial Summary Judgment, dated April 10, 1997, is unreported and appears as Appendix J.

This Court's October 7, 1996 order denying certiorari from the Eighth Circuit's first decision in this case is reported as *Veneklase v. City of Fargo*, 519 U.S. 867 (1996). The Eighth Circuit's first decision, entered on March 6, 1996, reversing the denial of qualified immunity to Fargo's police officers and remanding the case for consideration of claims against Respondent, is reported as *Veneklase v. City of Fargo*, 78 F.3d 1264 (8th Cir. 1996). The first order of the United States District Court for the District of North Dakota on cross motions for summary judgment, dated February 17, 1995, is reported as *Veneklase v. City of Fargo*, 904 F.Supp. 1038 (D.N.D. 1995).

## STATEMENT OF JURISDICTION

Review is sought from the *en banc* decision of the United States Court of Appeals for the Eighth Circuit entered on February 13, 2001. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. §1254(1).

## RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

The City of Fargo Residential Picketing Ordinance, No. 2190 (1985), is set forth as Appendix K hereto. Set forth in Appendix O are UNITED STATES CONST. AMEND. I, 42 U.S.C. § 1983, 28 U.S.C. § 455(a), and Rule 36 of the Federal Rules of Civil Procedure ("F.R.C.P.").

## STATEMENT OF THE CASE

### I. SUMMARY OF THE CASE

In *Frisby v. Schultz*, 487 U.S. 474 (1988), this Court reviewed a Brookfield, Wisconsin ordinance which banned "picketing before or about the residence or dwelling of any individual in the Town of Brookfield." The lower courts found the ordinance to be a total ban on residential picketing and struck it down for unconstitutional overbreadth. All nine justices of this Court agreed that the Brookfield ordinance was overbroad as written, but a majority of the Court saved it by applying the "well-established principle that statutes be interpreted to avoid constitutional difficulties." 487 U.S. at 483. The Court accepted representations of Brookfield's counsel about how the ordinance would be enforced and upheld its facial validity with this narrowed

constitutional construction:

> General marching through residential neighborhoods, or even walking a route in front of an entire block of houses, is not prohibited by this Ordinance. Accordingly, we construe the ban to be a limited one; only focused picketing taking place solely in front of a particular residence is prohibited.

*Id.*

On October 10, 1991, more than three years after *Frisby* was decided, the City of Fargo arrested Petitioners under a City of Fargo ordinance enacted in 1985, which was held to be "virtually identical" to the *Frisby* ordinance. *Veneklase v. City of Fargo*, 78 F.3d 1264, 1267, n.4 (8th Cir. 1996). Respondent's policymaker and police officers, however, were completely unaware of the *Frisby* decision and of this Court's narrowing construction essential to saving the ordinance. Consequently, Fargo enforced its ordinance as a total ban on residential picketing and arrested Petitioners for walking a six to eight house route nearly 400 feet in length. The arrests were subsequently approved by Fargo's law enforcement policymaking official, who understood and intended the ordinance to ban any picketing route, no matter how expansive, so long as at least one "targeted" residence was on the route. In other words, Fargo enforced its *Frisby*-style ordinance as if *Frisby* did not exist.

Yet, a six to five majority of the *en banc* Eighth Circuit has upheld Fargo's enforcement of the ordinance directly, contrary to *Frisby's* "narrowing construction that avoids constitutional

difficulties." *Frisby*, 487 U.S. at 482.[1] For a federal appellate court to order the dismissal of Petitioners' claims by reasoning that *Frisby* permits what it actually forbids not only undermines this Court's authority and represents serious constitutional error, it also invites other cities in the Eighth Circuit and elsewhere to enact and enforce *Frisby*-style ordinances in an unconstitutional manner anytime they want to eliminate residential public sidewalks as a public forum for unpopular views.

Finally, the role of Judge Kermit Bye in casting the tie breaking vote against Petitioners has created a serious appearance of judicial impropriety which taints this case. Prior to joining the Eighth Circuit last year, Judge Bye was a long-time partner in the law firm which represented the abortion clinic director (Jane Bovard) who is at the center of this case and who testified against Petitioners during trial. "Does the deck seem stacked? You bet." *Hill v. Colorado*, 530 U.S. 703, 764 (2000) (Scalia, J., dissenting). Judge Bye's role in casting the *tie-breaking vote* in this case against his client's political adversaries lends a whole new dimension to that observation.

## II. STATEMENT OF FACTS

### A. Respondent's Residential Picketing Ordinance: Intended as a Total Ban and Targeted to Anti-abortion Protesters.

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[1] As Judge Richard Arnold wrote in his powerful dissent, "If the First Amendment permits a city to criminalize marching up and down a residential street, with persuasive intent, in front of thirty or even a hundred houses, provided only that the picket goes past one targeted residence in the course of the march, then it is hard to imagine what kind of 'constitutional difficulties' the *Frisby* court could have had in mind." *Veneklase v. City of Fargo*, *Slip Op.* at 36, 37, App. at A25.

On January 29, 1985, Respondent City of Fargo, North Dakota passed a residential picketing ordinance (later amended and recodified as Fargo Municipal Ordinance 10-0802) which stated:

> No person shall engage in picketing the dwelling of any individual in the City of Fargo.

App. at K1. Fargo's City Attorney explained the origins and goal of Fargo's ordinance:

> The City of Fargo did not have a residential picketing ordinance until 1985. The adoption of the ordinance at that time was an outgrowth of actual and anticipated residential picketing of individuals employed at the Women's Health Organization, a local abortion provider which had been established in the mid-1980's.
>
> There was considerable public debate on the ordinance and needless to say, deep division of opinion on the issue of abortion. However, it was my impression that the consensus was that protests of that nature were not appropriate in residential areas.

Affidavit of Wayne O. Solberg dated September 29, 1997, paras. 3-4. App. at N2.

### B. Petitioners Arrested for Walking in Silent Prayer on Residential Sidewalks in Front of an Entire Block of Houses.

On October 10, 1991, Petitioners Chris Veneklase, Paul B. Mehl, Darold Larson, Nancy Emmel and Jessica Uchtman, along

with ten to fifteen other individuals, decided to engage in silent prayer in the residential neighborhood of Jane Bovard, the administrator of Fargo's only abortion clinic. Petitioners had no intention of targeting Bovard's residence with their presence and gave no emphasis to Bovard's residence or to any other residence. Petitioners stayed on the public sidewalk, did not block access to or from private property, moved continually in front of a block of six to eight houses, did not carry signs, and remained silent until approached by Fargo Police Officers responding to Bovard's complaint. App. at P1-P2, P4.

The Fargo police had observed Petitioners and those with them walking and praying for approximately ten minutes. The police reports describe Petitioners walking north and south on the public sidewalk. They appeared to be praying or meditating; some of them were holding rosary beads or had their hands folded. App. at P1-P2. Finally, Fargo police officer Jon Holman approached and talked with Petitioner Chris Veneklase. Holman stated that Petitioners were violating the Fargo ordinance and would be arrested if they did not leave. Veneklase was familiar both with Fargo's ordinance and with *Frisby v. Schultz* at the time and insisted that the group was not even picketing. Holman repeated to Veneklase that group members would be arrested if they did not leave, offering no alternative for how they could remain lawfully in Bovard's neighborhood. When Petitioners remained and continued to pray silently, they were arrested and subsequently prosecuted for violations of the ordinance. *See* Affidavit of Christopher Martin Veneklase, paras. 6-9, App. at L2-L4. The criminal charges were later dismissed by the state trial court on the ground that Petitioners' conduct was protected under *Frisby v. Schultz.* App. at J3.

### C. Fargo Policymaker Ratified Officer Holman's Decision To Arrest.

Officer Holman's only guide for enforcing the ordinance was the text of the ordinance itself. *Veneklase v. City of Fargo*, 904 F.Supp. 1038, 1057 (D.N.D. 1995) (citing testimony of Chief of Police Raftevold). Ronald Raftevold was Respondent's Chief of Police and top policymaking official both with respect to the enforcement of City ordinances and the instruction, training and discipline of the City of Fargo's police officers. *Id.* Chief Raftevold testified that, to the best of his knowledge, there were no policies, procedures or guidelines for the enforcement of the ordinance. *Id.* At the time of his deposition in April 1994, Raftevold still had no knowledge of *Frisby*, had sought no guidance from the City Attorney on how it applied to Fargo's ordinance, and had not instructed Fargo's police officers regarding enforcement. *Id.* Based on the police reports filed after Petitioners were arrested (App. P), Chief Raftevold believed the arresting officers had probable cause to arrest Petitioners. Raftevold further believed that the Ordinance would have been properly enforced against a single individual picketing in front of thirty or even one hundred residences. *Slip. Op.* at 32-33 (Arnold, R., J., dissenting), citing J.A. at 243-45. App. at A22-A23. Consistent with Chief Raftevold's approval of Officer Holman's application of the ordinance, Respondent made admissions under F.R.C.P. 36 that the arresting officers acted pursuant to (i) the City's official policies, customs, practices and procedures, and (ii) their training and instruction as Fargo police officers, when they arrested Petitioners. *See* App. M. Additional relevant facts will be presented below in the context of the issues discussed.

## III. THE COURSE OF PROCEEDINGS

On October 8, 1993, Petitioners filed a complaint in the United

States District Court for the District of North Dakota, seeking damages pursuant to 42 U.S.C. §1983 from Respondent City of Fargo and four Fargo police officers for violations of Petitioners' federal constitutional rights.

On February 17, 1995, the District Court denied qualified immunity to the defendant police officers and granted summary judgment to Petitioners on their constitutional claims against the City and the officers.

The police officers filed an interlocutory appeal to the United States Court of Appeals for the Eighth Circuit, which reversed the District Court and granted qualified immunity to the officers. *See Veneklase v. City of Fargo*, 78 F.3d 1264 (8th Cir. 1996) ("*Veneklase I*"). Rehearing *en banc* was denied on April 24, 1996, 1996 U.S. App. LEXIS 9467, and a Petition For A Writ Of Certiorari was denied by this Court on October 6, 1996. 519 U.S. 867 (1996).

After remand, the District Court granted summary judgment to Petitioners and against Respondent City of Fargo based upon the facial unconstitutionality of Fargo's ordinance.[2] In August 1997, a jury awarded $2,431.00 in damages to Petitioners, after which the

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[2] The theory of liability on which Petitioners prevailed in the District Court - facial unconstitutionality due to the content-based nature of Fargo's picketing definition - was governed by the holding of *Kirkeby v. Furness*, 92 F.3d 655 (8th Cir. 1996). Petitioners defended the District Court judgment on that basis to the Eighth Circuit but also pursued the other theories presented in this Petition. After this Court decided *Hill v. Colorado*, 530 U.S. 703 (2000), *Kirkeby's* content neutrality holding was reversed by the *en banc* Eighth Circuit, which devoted most of its opinion to that issue. Petitioners disagree with *Hill* and believe that the *Kirkeby* analysis of content neutrality is correct. However, they do not present it as an issue in this Petition.

District Court awarded Petitioners $50,025.25 in attorney fees and $2,178.00 in litigation costs on March 31, 1998. App. I. The City of Fargo appealed.

On August 30, 1999, a three judge panel again reversed the District Court. The panel granted rehearing and subsequently issued another opinion again reversing the judgment of the District Court. 200 F.3d 1111 (8th Cir. 1999), vacated, 2000 U.S. App. LEXIS 2255. App. H. The Eighth Circuit granted rehearing *en banc* on February 16, 2000, *id.*, App. G, and held oral argument before ten judges on April 11, 2000.

On September 7, 2000, the Eighth Circuit gave notice that newly confirmed Judge Kermit E. Bye would join the *en banc* court for this case. App. F. Petitioners promptly filed a motion requesting that Judge Bye recuse himself because of his position as a partner during his firm's attorney-client relationship with Jane Bovard, who is a central figure in this case as the perceived victim of the alleged picketing crime. After Judge Bye entered an order denying the recusal motion, 236 F.3d 899, App. E, Petitioners sought reconsideration both from Judge Bye and from the *en banc* court. Both requests were denied. Apps. C and D.

On February 13, 2001, the Eighth Circuit entered its *en banc* decision reversing the judgment of the District Court by a vote of six to five. App. A. Judge Bye cast the tie-breaking vote for the majority. Judge Richard Arnold wrote a dissent joined by four other judges, including Chief Judge Roger L. Wollman. App. at A19.

## REASONS FOR GRANTING THE WRIT

### I. A WRIT OF CERTIORARI SHOULD BE GRANTED TO ENSURE UNIFORMITY OF DECISIONS APPLYING *FRISBY V. SCHULTZ* THROUGHOUT THE UNITED STATES.

### A. The Eighth Circuit Court of Appeals Decision Completely Vitiates the Right to Non-Focused Residential Picketing *Frisby v. Schultz* Protects.

A bare majority of a closely divided *en banc* Eighth Circuit has aggressively cast aside the narrowed construction devised by this Court to save the residential picketing ordinance reviewed in *Frisby v. Schultz*, 487 U.S. 474 (1988). The *en banc* majority has decided that Fargo's "virtually identical" ordinance will have a contrary meaning.

Two important principles were applied in *Frisby*: (1) that residential streets and sidewalks, regardless of the legitimate residential privacy interest, are traditional public fora for free speech; and (2) that although the unique nature of a residential setting may permit different restrictions than would be appropriate for other public fora, the standard of "reasonable time, place and manner" restrictions still applies. *Id.* at 480-81.

Thirteen years later, the Eighth Circuit has violated *Frisby's* unambiguous holding by approving precisely what all nine members of the *Frisby* Court rejected as unconstitutional: Fargo's *de facto* ban on all residential picketing. The *en banc* majority reasoned that, first:

> Because the picketing prohibited by the ordinance is speech directed not to the general public but primarily at those who are presumptively unwilling to receive it, the City has a substantial and justifiable interest in banning it. The nature and scope of this interest make the ban narrowly tailored. The ordinance also leaves open ample channels of communication.

*Slip Op.* at 13, App. at A13. Second, the court concluded, "an individual engaged in an activity that is directed at a specific occupant of a dwelling falls within the legitimate sweep of the ordinance." *Slip Op.* at 14, App. at A15. Doing its best to portray *Frisby*-style reasoning, the *en banc* majority has actually created a head-to-head confrontation with *Frisby*. The court has equated a non-focused, silent prayer line passing by five to eight houses, with focused picketing "taking place solely in front of a particular residence." This expansive notion of the "legitimate sweep of the ordinance" conflicts with the holding of *Frisby* and its application by at least three other circuit courts, *see* discussion *post*.

When citizens acting in good faith compliance with a Supreme Court decision can be arrested anyway, with no adverse consequences for a municipality whose officials are completely unaware of such precedent and intend to enforce the law contrary to that precedent, something has gone gravely wrong with the rule of law. Certiorari should be granted to reestablish clarity in this important First Amendment area, so that other innocent citizens are not forced to bet their liberty every time they desire to speak, protest or walk in silent prayer in a residential area.

### B. Facial Overbreadth and the Merits of Judge Arnold's Dissent.

The argument for finding Respondent's ordinance facially overbroad absent a proposed limiting construction is presented accurately and conclusively in Judge Richard S. Arnold's dissenting opinion. Each of the four Justices who wrote opinions in *Frisby* stated concerns about the overbreadth of the ordinance as written. The dissenting opinions rejected the reasoning of the *Frisby* majority not in favor of according greater protection to the

residential privacy interest, but in favor of striking down the ordinance altogether. 487 U.S. at 496. The concurring opinion of Justice White foreshadowed Fargo's enforcement:

> In my view, if the ordinance were construed to forbid all picketing in residential neighborhoods, the overbreadth doctrine would render it unconstitutional on its face....

487 U.S. at 491 (White, J., concurring).

"In evaluating the facial challenge, we must look not only at how the ordinance has actually been enforced, but, more importantly, at what sort of enforcement it authorizes." J. Arnold dissent, *Slip Op.* at 22, n.2., App. at A23. A federal court must determine what a statute authorizes before it can judge its facial unconstitutionality. *Broadrick v. Oklahoma*, 413 U.S. 601, 617 (1973). A facial overbreadth analysis requires the Court to "consider the actual text of the statute as well as any limiting constructions that have been developed." *Boos v. Barry*, 485 U.S. 312, 329 (1988). "In evaluating [a] facial challenge, we must consider the county's authoritative constructions of the ordinance, including its own implementation and interpretation of it." *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 132 (1992). *See also Ward v. Rock Against Racism*, 491 U.S. 781, 795 (1989) ("Administrative interpretation and implementation of a regulation are, of course, highly relevant to our analysis . . . in evaluating a facial challenge.")

Judge Arnold's dissent, therefore, properly delineated the startling sweep of the City of Fargo's ordinance in light of Fargo's intended application. The testimony of Chief Raftevold removes any doubt about the overbreadth of Fargo's ordinance and highlights the Eighth Circuit's direct conflict with *Frisby*:

> Q. In front of thirty dwellings. He goes back and forth in front of thirty dwellings, but he only knows one person who lives in one of those dwellings and his message is very much directed at that person and to all the neighbors.
>
> A. I would say there was probable cause that he was in violation of that ordinance.
>
> Q. Okay. And if we expand that same fact from thirty to a hundred houses.... would that change the applicability of the ordinance?
>
> A. I don't believe so.

Arnold dissent, *Slip Op.* at 22-23, App. at A22-A23.

According to the *en banc* majority, focused picketing banned under *Frisby* includes any expressive activity in a residential area "directed at a specific occupant of a dwelling." *Slip Op.* at 14, App. at A15. Applying Chief Raftevold's testimony to the reasoning of the *en banc* majority, Fargo can ban a picketing route nearly two miles long if an identifiable or (as in this case) perceived "target" resides anywhere along the route. The extent of the route and the peacefulness of the protestors are irrelevant to the *en banc* majority, which effectively permits cities to ban all picketing in residential areas if the police can perceive a target.

Because Fargo's "impermissible applications of the law [100+ houses] are substantial when judged in relation to the statute's plainly legitimate sweep [one house]," *Broadrick v. Oklahoma*, 413 U.S. at 615, its ordinance is facially unconstitutional. Certiorari should be granted to address the Eighth Circuit's radical departure from *Frisby*.

### C. Unconstitutionality of the Fargo Ordinance as Applied to Petitioners: Banning Silent Prayer on Public Sidewalks Absent Any Significant Countervailing

**Interest.**

Further, Respondent's ordinance was unconstitutionally overbroad (*i.e.*, not narrowly tailored) as applied to Petitioners in light of *Frisby* because Petitioners' non-invasive conduct did not implicate the countervailing "privacy" interest articulated in *Frisby*.

The singular justification for *Frisby's* narrow construction of Brookfield's ordinance was the legitimate interest in protecting the privacy of the home. The factual backdrop of *Frisby* included protesters who shouted offensive slogans (*e.g.*, "baby killer"), entered onto the abortionist's property, tied ribbons on his shrubbery, placed a protest sign at his front door, and allegedly prevented his family from leaving the property. *Schultz v. Frisby*, 619 F.Supp. 792, 795 (E. D. Wis. 1985). Construing the Brookfield ordinance to protect any resident from such focused behavior is legitimate and understandable.

Nothing remotely similar happened in this case. The District Court's first opinion granting summary judgment to Petitioners on an "as applied" basis balances the competing interests with skill and clarity:

> In this case, defendants gave undue emphasis to Fargo residents' privacy at the expense of plaintiffs' First Amendment rights.... The court recognizes the state's substantial interest in protecting residential privacy and acknowledges that plaintiffs' conduct might have invaded the privacy of the residents on Edgewood Drive.... However, the court also finds that the degree of [plaintiffs'] intrusiveness was minor. Plaintiffs were silent. Their presence would have gone unnoticed unless the neighborhood residents looked out their windows or left their homes. Furthermore, there is no evidence in the

> record indicating that plaintiffs blocked access to a residence or interfered with domestic tranquility in any other manner. Accordingly, the court finds that the Fargo residential picketing ordinance as applied in this case eliminated more than the exact source of evil the city legislators sought to remedy.
>
> *****
>
> Plaintiffs' picketing extended well beyond one residence and they placed no particular emphasis on any individual dwelling. Furthermore, the manner in which they conducted their demonstration was as accommodating to residential privacy interests as any picket could be. *Construing the Fargo ordinance to constitutionally prohibit plaintiffs' conduct would essentially render a citizen's right to picket in a Fargo residential neighborhood meaningless.*

*Veneklase v. City of Fargo*, 904 F. Supp. at 1050 (emphasis supplied).

As the District Court suggested, if silent prayer along an entire block of houses on public sidewalks impermissibly invades the privacy of the home, then residential sidewalks are no longer public fora, and *Frisby* is no longer good law. Clarification from this Court on this issue will provide valuable guidance to cities drafting ordinances and demonstrators trying to abide by them.

### D. The Eighth Circuit's Holding is in Direct Conflict with the Sixth Circuit and Conflicts in Principle with at Least Two Other Circuits.

In *Vittitow v. City of Upper Arlington*, 43 F.3d 1100 (6th Cir. 1995), the Sixth Circuit accepted *Frisby* for its plain meaning:

"*Frisby* could not be more clear: '[O]nly focused picketing taking place solely in front of a particular residence is prohibited.'" 43 F.3d at 1107, citing *Frisby,* 487 U.S. at 483. Thus, "Any linear extension [of a picketing ban] beyond the area 'solely in front of a particular residence' is at best suspect, if not prohibited outright." 43 F.3d at 1105 (footnote omitted). This direct conflict between the Sixth and Eighth Circuits is by itself solid ground for granting the writ. Supreme Court Rule 10(a).

At least two other circuits have likewise accepted *Frisby's* narrowing construction for protecting a particular residence. In *Lucero v. Trosch*, 121 F.3d 591 (11th Cir. 1997), the Eleventh Circuit Court of Appeals applied *Frisby* and this Court's further discussion of it in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), to "conclude that [a] 200-foot no approach residential buffer zone does not simply proscribe activities directly in front of the staff's residences, but rather operates as a generalized restriction on protesting and thus is unconstitutional." *Lucero*, 121 F.3d at 606.

On remand from this Court in *Schultz v. Frisby*, 877 F.2d 6, 7 (7th Cir. 1989), the Seventh Circuit rejected the argument that "the ordinance does not have the meaning the Town gave it in the Supreme Court." The Court stated: "[A]s far as this case is concerned, the meaning of the ordinance is what the Supreme Court said it means...." *Id. Cf. Murray v. Lawson*, 138 N.J. 206, 649 A.2d 1253 (1994) (remanded from the Supreme Court, 513 U.S. 802 (1994)), *cert. den.*, 515 U.S. 1110 (1995) ("A buffer of 100 feet is required [from abortion provider's residence] because it places the border of the zone *approximately one-and-one-half lots away* from the [provider's] residence").

## II. A Writ of Certiorari Should be Granted to Ensure Uniformity of Decisions Determining

## MUNICIPAL LIABILITY FOR AN UNCONSTITUTIONAL ARREST.

### A. Certiorari should be Granted to Clarify that a Municipality may still be Liable for Unconstitutional Arrests even if the Arresting Officers are entitled to Qualified Immunity.

After erroneously concluding that Fargo's ordinance was facially constitutional, the *en banc* majority committed clear error by converting the Eighth Circuit's earlier holding in *Veneklase I* on qualified immunity – that no "clearly established" rights had been violated – into the very different (and erroneous) holding that Petitioners' rights had not been violated at all. *Veneklase I* stated:

> Whether the protestors may, consistent with the *Frisby* holding, include houses adjacent to the targeted dwelling on the picketing route, is an issue which we need not resolve today, yet it is a significant question which lingers after *Frisby*.

*Veneklase I*, 78 F.3d at 1268. The *en banc* majority erroneously extended that qualified immunity decision to a ruling on the "as applied" constitutional issues, stating:

> The "as-applied" argument fails because this court held in the first appeal, *Veneklase I*, "that the arrest of plaintiffs by the defendant officers was objectively reasonable in light of the legal rules in existence at the time the action occurred." *Veneklase I*, 78 F.3d at 1269. This ruling became the law of the case.

*Slip Op.* at 15, App. at 15. A16.

This was clear error, as it is well established that municipal liability may still be imposed for a constitutional violation even when police officers enjoy immunity. *Leatherman v. Tarrant County Narcotics Intelligence*, 507 U.S. 163, 166 (1993) ("municipalities do not enjoy immunity from suit - either absolute or qualified - under § 1983").

Judge Arnold in dissent stated the law correctly. "A municipality faced with a §1983 action cannot plead qualified or absolute immunity, nor is the good faith of its officers a sufficient defense." *Slip Op.* at 25, App. at A26, citing *Owen v. City of Independence*, 445 U.S. at 622, 638 (1980). *See also City of Sacramento v. Lewis*, 523 U.S. 833, 859 (1998) (Stevens, J., concurring) (municipalities have "a risk of exposure to damages liability even when individual officers are plainly protected by qualified immunity").

The Eighth Circuit's patently erroneous conversion of the qualified immunity defense into a shield against municipal liability warrants certiorari review standing alone. Moreover, the Eighth Circuit's decision on this point conflicts with the explicit (and correct) conclusions of at least four other circuits. "While it would be improper to allow a suit to proceed against the city if it was determined that the officers' actions did not amount to a constitutional violation, there is nothing anomalous about allowing such a suit to proceed when immunity shields the individual defendants." *Watson v. City of Kansas City*, 857 F.2d 690, 697 (10th Cir. 1988). *See also Prue v. City of Syracuse*, 26 F.3d 14, 19 (2d Cir. 1994); *Leatherman v. Tarrant County Narcotics Intelligence*, 28 F.3d 1388, 1398, n. 15, (5th Cir. 1994); *Doe v. Sullivan County, Tenn.*, 956 F.2d 545, 554 (6th Cir. 1992). The Eighth Circuit's position is alarmingly out of line with the teachings of this Court as well as the holdings in other circuits. Certiorari should be granted to correct this unprecedented and unfortunate

misstatement of the law of municipal liability.

### B. There are Multiple Grounds Justifying Municipal Liability in this Case Should a Facial or an As-Applied Constitutional Violation be Established.

Because of its misapplication of the qualified immunity doctrine to effectively bestow a novel form of immunity on the City of Fargo in this case, the *en banc* majority failed to address the several compelling bases for municipal liability under principles first enunciated in *Monell v. Department of Social Services*, 436 U.S. 658 (1978). In *Monell*, this Court stated:

> [I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983.

*Id.* at 694. *Monell* established that cities can be liable for money damages where "the action that is alleged to be unconstitutional *implements or executes,*" *inter alia*, an "*ordinance*, regulation or decision officially adopted and promulgated by that body's officers." *Id.* at 690 (emphasis supplied). The undisputed evidence in this case presents three independent grounds for *Monell* liability, "assuming, arguendo, that the arrests were unconstitutionally made." *Slip Op.* at 15. App. at A16.

First, Respondent's ordinance "was unquestionably the 'moving force' behind the police officers' arrest of plaintiffs for their picketing activities." App. at J10. Officer Holman testified that he had no prior training of any kind for enforcing the ordinance, and that the text of the ordinance was his sole guide when determining

probable cause for the arrest. 904 F.Supp. at 1057.

Second, Respondent provided Rule 36 admissions that the arresting officers acted pursuant to (i) the City's official policies, customs, practices and procedures, and (ii) their training and instructions as City of Fargo police officers, when they arrested Petitioners. App. M. The *en banc* majority briefly discussed the City's admissions only to the extent of repeating the District Court's earlier misstatement of Petitioners' position. *Slip Op.* at 24, 25, App. at A16-A17. A Rule 36 admission is not dependent on a separate ratification theory - it stands alone as conclusive proof unless withdrawn.

A third ground for imposing *Monell* liability is the explicit ratification of and continuing support for every act of the arresting officers by Respondent's authorized policymaker. When policymakers approve a subordinate's decision and the basis for it, their ratification is chargeable to the municipality because their decision is final. *Praprotnik v. City of St. Louis*, 485 U.S. 112, 153 (1988) (plurality opinion). Ratification of unconstitutional conduct has been recognized consistently in the other federal circuits as a basis for *Monell* liability because it is powerful evidence for city policy and custom. See *Grandstaff v. City of Borger, TX*, 767 F.2d 161, 171 (5th Cir. 1985); *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1248 (6th Cir. 1989), *Sherrod v. Barry*, 812 F.2d 195, 205 (7th Cir. 1987); *Bennett v. Slidell*, 728 F.2d 762, 769 (5th Cir. 1984) (*en banc*).

In this case, the arrests executed City policy: a complete residential picketing ban consistent with the literal text of the ordinance and fully approved by the policymaker after the fact. If this Court is moved to grant certiorari on the First Amendment issues presented in this petition, such review will not be in vain. There is ample ground for finding municipal liability in this case if the ordinance is determined to have been unconstitutionally applied to

Petitioners' conduct.

## III. CERTIORARI SHOULD BE GRANTED TO ADDRESS THE STANDARD FOR RECUSAL UNDER 28 U.S.C. §455(a) AND TO ESTABLISH THAT NO JUDGE SHOULD DECIDE A CASE WHERE A FORMER CLIENT IS THE VICTIM OF THE ALLEGED CRIME.

On October 10, 1991, at the same time Jane Bovard was calling the Fargo police to have Petitioners arrested for praying in her neighborhood, her abortion clinic was being represented by attorney Kermit Bye's Fargo law firm in two different cases involving abortion. Bovard later testified in the trial of this action as the victim of the alleged picketing crime.

After this case had been argued and submitted to the *en banc* court, and shortly after Judge Kermit Bye was confirmed, Judge Bye elected to join the *en banc* court and, without disclosing his prior relationship with Bovard to the parties in this case, ultimately proceeded to cast the tie-breaking vote against Bovard's political adversaries. Asserting his ability to be fair in this case, Judge Bye perceived no appearance of impropriety. App. at E4. The Eighth Circuit apparently lacks any procedures for reviewing a judge's self-assessment on such sensitive matters. *See* App. C.

A judge is obligated to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. §455(a). "The very purpose of §455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 865 (1988). The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact. *Id.* at 869-70 (citation omitted). *See also Liteky v. United States*, 510 U.S. 540 (1994).

The appearance of impropriety in this case is patent. As Petitioners pointed out in their recusal motion, Judge Bye's vote would only matter as a six to five tie-breaker. For him to participate anyway and swing the case against Bovard's pro-life adversaries looks like the proverbial "stacked deck."

Setting aside the passion that is inherent in any dispute between pro-life and abortion rights organizations, however, it should be clarified that a potential conflict is strongly suggested when a judge participates in a case where a former client is postured (and testifies) as the victim of a purportedly criminal act. Judge Bye essentially dismissed this suggestion by saying, in essence, that there was no controlling legal authority which required his recusal. In view of the potential damage an appearance of conflict may inflict upon the public's trust in the judicial system, however, the recusal statute should be clarified to require judges to err on the side of caution in these circumstances.

## CONCLUSION

For the reasons stated herein, Petitioners respectfully request that this Court grant their petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit and consider the question presented herein.

Respectfully submitted,

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May 14, 2001

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Chris Veneklase, Paul B. Mehl, Darold Larson, Nancy Emmel, Jessica Uchtman, Plaintiffs-Appellees, v. City of Fargo, Defendant-Appellant.

No. 98-2147

**UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

2001 U.S. App. LEXIS 2249

October 6, 2000, Submitted
February 13, 2001, Filed

**DISPOSITION:**

Judgment against the City of Fargo for damages and assessment of attorney's fees REVERSED.

**COUNSEL:**

For CHRIS VENEKLASE, PAUL B. MEHL, DAROLD LARSON, NANCY EMMEL, JESSICA UCHTMAN, Plaintiffs - Appellees: Peter B. Crary, Fargo, ND. Thomas W. Condit, Milford, OH.

For CITY OF FARGO, Defendant - Appellant: Mike Miller, SOLBERG & STEWART, Fargo, ND.

**JUDGES:**

Before WOLLMAN, Chief Judge, BRIGHT, McMILLIAN, RICHARD S. ARNOLD, BOWMAN, BEAM, LOKEN,

HANSEN, MORRIS SHEPPARD ARNOLD, MURPHY, and BYE, Circuit Judges. RICHARD S. ARNOLD, Circuit Judge, joined by WOLLMAN, Chief Judge, BOWMAN, BEAM, and MORRIS SHEPPARD ARNOLD, Circuit Judges, dissenting.

**OPINION:**

PER CURIAM.

This case has a lengthy, almost ten-year litigation history beginning when plaintiffs-appellees sued the City of Fargo, North Dakota and several police officers asserting that they were arrested in violation of their constitutional rights for alleged violation of Fargo's residential picketing ordinance. After extensive litigation before a magistrate judge in the district court and before panels of this court, plaintiffs-appellees obtained a judgment for damages against only the City of Fargo in the sum of $ 2431, plus attorney's fees in excess of $ 52,000. The City appealed from the judgment, and this matter is now before the court en banc. We reverse and remand for entry of judgment of dismissal in [*2] favor of the City.

I. BACKGROUND

The background and history of this litigation may be found in the panel opinion reversing the judgment after a rehearing by the panel. *Veneklase v. City of Fargo, 200 F.3d 1111 (8th Cir. 1999)* ("Veneklase II"), vacated by order granting reh'g en banc. As relevant, the opinion stated:

> This case has an extensive, almost eight-year history. In Fargo, North Dakota, on October 10, 1991, at approximately 10:00 p.m., activists picketed the home of an abortion clinic administrator and one or two

houses on either side of her home. The Fargo Police Department received a complaint about the residential picketing. Fargo police officers advised the picketers that their conduct violated Fargo's then applicable residential picketing ordinance.

Fargo's ordinance, enacted in 1985, reads as follows:

> 10-1201. Definitions. --For purposes of this article, certain words and phrases used herein are defined as follows:
>
> A. "Dwelling" means any structure or building, or dwelling unit within a building, which is used as a place of residence.
>
> B. "Picketing" means the practice of standing, marching, or patrolling by one or more [*3] persons inside of, in front, or about any premises for the purpose of persuading an occupant of such premises or to protest some action, attitude or belief.
>
> 10-1202. Picketing of dwellings prohibited. – No person shall engage in picketing the dwelling of any individual in the City of Fargo.

....After the picketers refused to leave the scene, the Fargo police arrested the picketers and charged them with violating the ordinance. The Fargo police transported the plaintiffs to the Cass County Jail and held them overnight. The Fargo police detained plaintiff Uchtman, a minor at the time of her arrest, for only a few hours and released her to the custody of her parents. Fargo filed charges against plaintiffs Veneklase, Mehl, Larson and Emmel for violating the residential picketing ordinance. On February 18, 1992, Cass County Judge Frank L. Racek dismissed the charges against plaintiffs, deciding that the ordinance was constitutional on its face but unconstitutional as

applied to the plaintiffs on October 10, 1991.

Plaintiffs subsequently filed this action, pursuant to *42 U.S.C. § 1983,* against Fargo, Officer David Todd, Officer Jim Schalesky, Lieutenant Jon [*4] Holman, and Sergeant Wayne Jorgenson seeking redress for their arrest and incarceration. On February 17, 1995, a Magistrate Judge denied the individual police officers' claim of qualified immunity. The district court concluded that the officers' conduct was not "objectively reasonable" in light of clearly established law. The district court also concluded that Fargo failed to train its officers properly and, as a result, was "deliberately indifferent" to the rights of the picketers and liable for damages as a matter of law. *Veneklase v. City of Fargo, 904 F. Supp. 1038, 1058 (D. N.D. 1995).* In addition, the district court concluded that the ordinance did not violate the constitution on its face because the ordinance constituted a valid content-neutral regulation. *Id. at 1044-48.* Fargo and the police officers appealed to this court from the interlocutory order. We reversed the denial of qualified immunity and held that the interlocutory appeal on the issue of municipal liability was not properly before the court. *Veneklase v. City of Fargo, 78 F.3d 1264, 1270 (8th Cir. 1996)* ("Veneklase I"). We then remanded the case to the district [*5] court for further proceedings against Fargo. Id.

On April 10, 1997, the district court determined that Fargo was liable as a matter of law and again granted summary judgment in favor of the plaintiffs. The district court concluded that the ordinance was unconstitutional as a content-based restriction on free speech. The district court then referred the issue of damages to a jury for a trial. That trial, held in August 1997, resulted in damages against Fargo in favor of the five plaintiffs ....

200 F.3d at 1113-14 (footnotes omitted).

The panel considered the case twice. Initially, it reversed in an opinion filed August 30, 1999. On the plaintiffs' petition for rehearing, the panel vacated its initial opinion and granted a rehearing. It did so to give the plaintiffs an opportunity to address further the panel's determination that the 1985 Fargo ordinance passed the test of content neutrality. See *Veneklase II,* 200 F.3d at 1111, n*.

As noted, the award of damages by the district court rested on its determination that the enforcement of the Fargo ordinance in question violated the plaintiffs' constitutional rights as a content-based restriction of free [*6] speech.

The panel opinion rejected that ruling, determining that the 1985 Fargo ordinance in question passed the test of content neutrality and was not facially unconstitutional, relying for its ruling on the United States Supreme Court case of *Frisby v. Schultz,* 487 U.S. 474, 101 L. Ed. 2d 420, 108 S. Ct. 2495 (1988). The panel also rejected other constitutional challenges to the arrests.

Plaintiffs-appellees petitioned for a rehearing en banc, asserting error in the panel's determination of content neutrality and disregard by the panel of an earlier Eighth Circuit decision relating to Fargo's amended 1993 residential picketing ordinance which maintained that similar, crucial language defining residential picketing was not content neutral. That earlier case cited by plaintiffs is *Kirkeby v. Furness,* 92 F.3d 655 (8th Cir. 1996) ("Kirkeby II").

The petition for rehearing did not raise as a basis for en banc consideration the issue of the liability of the City of Fargo for the unconstitutional enforcement of the ordinance.

However, that ground exists in plaintiffs' initial briefs as an alternate ground for affirmance by the court.

We granted [*7] a rehearing en banc on February 16, 2000, and heard oral argument on April 11, 2000. On September 7, 2000, the court vacated the submission in order to permit Judge Kermit E. Bye to participate. Judge Bye joined the court on April 22, 2000, after the initial en banc submission. Pursuant to the Eighth Circuit's established procedures, an active judge joining the court after an en banc submission may participate in pending en banc cases. By an order dated September 7, 2000, the court vacated the prior en banc submission of April 11, directed resubmission to the en banc court without further oral argument and on the basis of the original and supplemental briefs. The order also requested additional simultaneous briefs by the parties on the following questions:

1. Does the decision in *Hill v. Colorado,* 530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000), have any bearing on the question of the invalidity, facial or as-applied, of the 1985 Fargo ordinance at issue in this case.

2. Whether the holding of *Frisby v. Schultz,* 487 U.S. 474, 101 L. Ed. 2d 420, 108 S. Ct. 2495 (1988), limits the 1985 ordinance's scope of picketing in front of only one [*8] house, or "whether protestors may, consistent with the Frisby holding, include houses adjacent to the targeted dwelling on the picketing route." See *Veneklase v. City of Fargo,* 78 F.3d 1264, 1268 (8th Cir. 1996).

8th Cir. Order, Sept. 7, 2000.

After careful review, we determine the plaintiffs' claim of facial unconstitutionality of the ordinance must be rejected. The ordinance in question is content neutral, and not void for vagueness or overbreadth. Further, based on the record of this case, applicable Supreme Court case law, the opinion of this court in the prior appeal ( *Veneklase I,* 78 F.3d at 1269), and

other Eighth Circuit precedents foreclose any affirmance on the alternative grounds argued by plaintiffs-appellees.

We essentially adopt the panel opinion in *Veneklase II,* 200 F.3d 1111, and expand its reasoning in light of the recently decided case of *Hill v. Colorado,* 530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000), by the United States Supreme Court. The judgment of the district court, granting the plaintiffs' motion for summary judgment against the City and entering an order allowing damages [*9] and attorney's fees and costs against the City, will therefore be reversed.

## II. DISCUSSION

The essential facts were stated in Veneklase I which we quote:

> On the evening of October 10, 1991, plaintiffs engaged in a demonstration outside the administrator's residence. They walked back and forth, in single file, on the sidewalk in front of the administrator's home, but their route included approximately two to three houses on either side of the administrator's residence. In addition, one protester remained in front of the administrator's home at all times. Plaintiffs remained silent and carried no signs. In response to a complaint, the defendant officers arrived and informed the demonstrators that their actions violated the ordinance. The officers thereafter arrested those persons who refused to leave (plaintiffs in this action, with the exception of one protester, a minor). Although plaintiffs were charged with violating the ordinance, these charges were later dismissed by the county court judge.

*Veneklase I,* 78 F.3d at 1266 (footnote omitted), reh'g en banc denied, 1996 U.S. App. LEXIS 9467, cert. denied, 519 U.S. 867 (1996).

As a preliminary observation, [*10] we note that courts have traditionally subjected restrictions on public issue picketing to careful scrutiny. See, e.g., *Boos v. Barry,* 485 U.S. 312, 318, 99 L. Ed. 2d 333, 108 S. Ct. 1157 (1988); *United States v. Grace,* 461 U.S. 171, 75 L. Ed. 2d 736, 103 S. Ct. 1702 (1983); *Carey v. Brown,* 447 U.S. 455, 65 L. Ed. 2d 263, 100 S. Ct. 2286 (1980). "Picketing" can include a wide variety of activities, including prayer. *Douglas v. Brownell,* 88 F.3d 1511, 1521 (8th Cir. 1996).

"Ordinances represent a legislative choice regarding the promotion of particular societal interests." *Madsen v. Women's Health Ctr., Inc.,* 512 U.S. 753, 764, 129 L. Ed. 2d 593, 114 S. Ct. 2516 (1994). The ordinance before us restricts a manner of speech in residential streets, a traditional public forum. Consequently, the ordinance is subject to the well-settled time, place, and manner test: the restriction must be content and viewpoint neutral, leave open ample alternative channels of communication, and be narrowly tailored to further a substantial governmental interest. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983). [*11] See also *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989) ("The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.") (upholding noise regulations).

A. Content Neutrality

With that background, we address the first issue, content neutrality. The plaintiffs and the City agree that the constitutionality of the ordinance is determined by the Supreme Court's decisions in *Hill v. Colorado,* 530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000) and *Frisby v. Schultz,* 487 U.S. 474, 101 L. Ed. 2d 420, 108 S. Ct. 2495 (1988).

Whatever justification initially existed for granting an en banc consideration and for affirming the district court on the ground that the 1985 ordinance is unconstitutionally content-based no longer exists in light of *Hill v. Colorado* and this court's recent decision in *Thorburn v. Austin,* 231 F.3d 1114 (8th Cir. 2000).

In *Hill,* a Colorado statute made it unlawful [*12] in regulated areas of a health care facility to knowingly approach within eight feet of another person "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person ...." *Hill,* 120 S. Ct. at 2484.

The Supreme Court reaffirmed that "government regulation of expressive activity is 'content neutral' if it is justified without reference to the content of regulated speech." Id. at 2491. The statute in Hill passed the content-neutrality test spelled out in *Ward,* 491 U.S. 781, 105 L. Ed. 2d 661, 109 S. Ct. 2746:

> The Colorado statute passes that test for three independent reasons. First, it is not a "regulation of speech." Rather, it is a regulation of the places where some speech may occur. Second, it was not adopted "because of disagreement with the message it conveys." This conclusion is supported not just by the Colorado courts' interpretation of legislative history, but more importantly by the State Supreme Court's unequivocal holding that the statute's "restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory [*13] language makes no

> reference to the content of the speech." Third, the State's interests in protecting access and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech. As we have repeatedly explained, government regulation of expressive activity is "content neutral" if it is justified without reference to the content of regulated speech.

*Hill, 120 S. Ct. at 2491* (footnote omitted).

Like Colorado's statute in *Hill*, Fargo's 1985 ordinance passes the test articulated in *Ward*. First, the ordinance's language, "No person shall engage in picketing the dwelling of any individual ..." (emphasis added), regulates nothing other than the particular location of where one may picket. J.A. at 2.

Second, the ordinance does not speak to which types of picketing are prohibited. Rather, it bans all picketing. It therefore cannot be said that the ordinance was adopted because of any disagreement with the message conveyed by the picketers. The preamble to the ordinance, evincing its purpose, references concerns about "the protection and preservation of the home." J.A. at 1. It states that the "public [*14] health and welfare" require that "citizens enjoy a feeling of well-being and tranquillity while in their homes"; "the practice of picketing before ... dwellings causes emotional disturbance and distress to the occupants." *Id.* There is no indication anywhere in the record that the ordinance was adopted because of any disagreement with certain messages.

Third, there is every indication that the City attempted to protect its citizens from unwanted speech, whatever the message, into their homes. The Supreme Court repeatedly has held that the government may protect an individual's right to be free from unwanted speech in the home. See, e.g., *Frisby,* 487 U.S. at 484-85*; Carey v. Brown,* 447 U.S. at 471*; FCC v.*

*Pacifica Found.*, 438 U.S. 726, 748-49, 57 L. Ed. 2d 1073, 98 S. Ct. 3026 (1978); *Rowan v. Post Office Dep't*, 397 U.S. 728, 738, 25 L. Ed. 2d 736, 90 S. Ct. 1484 (1970); *Kovacs v. Cooper*, 336 U.S. 77, 86-87, 93 L. Ed. 513, 69 S. Ct. 448 (1949). In this case, the City's interest of protecting the privacy of the home is unrelated to the content of the plaintiffs' speech. Thus, the ordinance [*15] here clearly passes the content-neutrality test of *Ward* and *Hill*.

Turning again to the Colorado statute, in addition to finding that it passed the *Ward* test, the Court specifically rejected a similar argument that the plaintiffs made here, one that the panel majority espoused in *Kirkeby II*, 92 F.3d 655 (8th Cir. 1996). In *Kirkeby II*, the panel held the definition of picketing contained in Fargo's 1993 residential picketing ordinance to be content-based. The ordinance defined picketing as activity engaged in "for the purpose of persuading the public or an occupant of such premises or to protest some action, attitude or belief." *Kirkeby II*, 92 F.3d at 659. Because it was impossible to tell whether a person was engaged in picketing without analyzing the message, the court reasoned that the limitation was not justified without reference to content. *Hill* rejected that analysis.

According to the Court's opinion in Hill, the necessity of looking at the content of a speaker's message to determine whether it was protest, education, or counseling is no different from determining whether particular conduct constitutes picketing. See [*16] *Hill*, 120 S. Ct. at 2492. Picketing, by definition, excludes "social, random, or other everyday communications," but the Court has "never suggested that the kind of cursory examination that might be required to exclude casual conversation from the coverage of a regulation of picketing would be problematic." *Id.*

Even Justice Kennedy, in his dissent, appears to agree that "no examination of the content of a speaker's message is required to determine whether an individual is picketing," even though the provision relating to protest, education, or

counseling is different, and, in Justice Kennedy's view, runs afoul of content neutrality, even if picketing does not. *Id.* at 2516 (Kennedy, J., dissenting).

We reject the argument that because an inquiry might be necessary to determine whether a person is picketing, the ordinance therefore is content-based. As *Hill* reasons, the "cursory examination" to determine if one is picketing does not make the law content-based. *Id.* at 2492. Further, a panel of this court in *Thorburn v. Austin,* 231 F.3d 1114 (8th Cir. 2000), ruled that *Kirkeby II,* 92 F.3d 655 (8th Cir. 1996), could not [*17] be relied upon to establish that the language in the Fargo ordinance "for the purpose of persuading" was content based, rather than content neutral. *Thorburn* construed a somewhat similar ordinance prohibiting focused residential picketing in Lincoln, Nebraska:

> The appellants rely on *Kirkeby v. Furness, 92 F.3d 655 (8th Cir. 1996),* where we held the definition of picketing contained in a residential picketing ordinance to be content-based. The ordinance defined picketing as activity engaged in "for the purpose of persuading the public or an occupant of such premises or to protest some action, attitude or belief." *Id. at 659.* Because it was impossible to tell whether a person is engaged in picketing without analyzing his message, we held that the limitation was not justified without reference to content. See id. Hill rejected this sort of analysis.
>
> According to the Court's opinion in Hill, the necessity of looking at the content of a speaker's message to determine whether it was protest, education, or counseling is no different from determining whether particular conduct constitutes picketing. See 530 U.S. at , [*18] 120 S. Ct. at 2492. Picketing, by definition, excludes "social, random, or other everyday communications," but the

> Court has "never suggested that the kind of cursory examination that might be required to exclude casual conversation from the coverage of a regulation of picketing would be problematic." *Id.* Engaging in demonstrations and attempting to influence opinions are inherent in picketing. *Hill* requires that we reject the appellants' argument that Casady's definition of picketing makes the Lincoln ordinance content-based.

*Thorburn,* 231 F.3d at 1118.

*Hill* also relies on *Frisby* as establishing the content neutrality of the Colorado statute, emphasizing "the contention that a statute is 'viewpoint based' simply because its enactment was motivated by the conduct of the partisans on one side of a debate is without support." *Hill,* 120 S. Ct. at 2494.

In sum, *Hill* and *Frisby* foreclose a conclusion that Fargo's 1985 ordinance is unconstitutional on its face for lack of content neutrality. The laws upheld in *Frisby* and *Hill,* and recently by this court in *Thorburn,* while respecting free speech rights, recognize [*19] that in limited circumstances the specific target of that speech is entitled to some protection from being forced to listen. This ordinance clearly falls into that category. This issue of content neutrality was the only issue decided in favor of the plaintiffs.

Having concluded the ordinance is content-neutral, we must determine whether it is narrowly tailored to serve a significant government interest and whether it preserves ample alternative channels of communication. Because the picketing prohibited by the ordinance is speech directed not to the general public but primarily at those who are presumptively unwilling to receive it, the City has a substantial and justifiable interest in banning it. The nature and scope of this interest make the ban narrowly tailored. The ordinance also leaves open ample alternative channels of communication. Thus, we reverse the determination of the

district court.

B. Vagueness and Overbreadth

The prior panel opinion in this case also addressed and rejected other assertions of the ordinance's facial unconstitutionality, specifically vagueness and overbreadth. In doing so, the panel relied on *Frisby* and stated that the Fargo ordinance adding [*20] the definitions of "dwelling" and "picketing" to the ordinance at issue in *Frisby* did not make the ordinance overbroad or vague. *Veneklase II,* 200 F.3d at 1117; cf. Hill, 120 S. Ct. at 2492 (noting that "picket" is defined to mean "persuade or otherwise influence"); *Thorburn* (stating that "perhaps the ordinance could have been more exact, but the fact that questions may arise regarding its applicability to certain conduct does not automatically lead to the conclusion that it is void for vagueness"), 231 F.3d at 1121.

The ordinance provides fair warning of the conduct that is prohibited. A person of ordinary intelligence can conclude that if he or she stands, marches, or patrols inside of, in front of, or about any dwelling of the person he or she intends to target, directing the picketing at that person, the picketer is subject to prosecution under the Fargo ordinance.

Furthermore, the Fargo ordinance does not leave those who are enforcing it with unfettered discretion to determine whether a violation has occurred. As Thorburn stated relative to a similar ordinance, "police officers will have to use discretion to determine [*21] whether an activity is picketing and whether it is focused, but enforcement of all laws involves some discretion." *Thorburn,* 231 F.3d at 1121. Because there is no real risk of discriminatory enforcement and because the ordinance makes clear what conduct it prohibits, we hold that it is not unconstitutionally vague.

For us to find a statute unconstitutionally overbroad, its "overbreadth ... must not only be real, but substantial as well,

judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma,* 413 U.S. 601, 615, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973). This court held recently that "prohibiting focused residential picketing is plainly legitimate." *Thorburn,* 231 F.3d at 1121. Here, an individual engaged in an activity that is directed at a specific occupant of a dwelling falls within the legitimate sweep of the ordinance.

*Hill* also strongly supports the rejection of plaintiffs' alternative theories of constitutional imperfection in the Fargo ordinance. The Court in *Hill* determined that the Colorado statute, significantly restrictive of speech, nevertheless was narrowly tailored, see *Hill,* 120 S. Ct. at 2494-97, [*22] and that the statute was neither overbroad nor unconstitutionally vague. See *id.* at 2498-99.

Accordingly, no basis exists for affirmance on plaintiffs' alternative constitutional theories.

C. Other Grounds for Affirmance

While the petition for rehearing did not raise the issue of an unconstitutional application of the ordinance, it was briefed in the plaintiffs' initial brief and argued briefly to the en banc court. Plaintiffs-appellees contend that the City should be responsible for any arrests made by police officers who, plaintiffs say, arrested them outside the parameters set out in *Frisby.* In short, plaintiffs claim that they did not violate the ordinance and they maintain that the arrests occurred pursuant to city policy, and, thus, the ordinance was unconstitutionally applied to them.

In our view, the "as-applied" issues were previously decided against plaintiffs by the district court after remand from *Veneklase I* and the contentions advanced on these issues do not justify an affirmance here on these alternative grounds. The "as-applied" argument fails because this court held in the first appeal, *Veneklase I,* "that the arrest of plaintiffs by the defendant [*23] officers was objectively

reasonable in light of the legal rules in existence at the time the action occurred." *Veneklase I,* 78 F.3d at 1269. n1 This ruling became the law of the case.

> n1 The opinion in *Veneklase I* commented on the contours of *Frisby* stating, "Whether protesters may, consistent with the *Frisby* holding, include houses adjacent to the targeted dwelling on the picketing route, is an issue which we need not resolve today, yet it is a significant question which lingers after *Frisby.* Thus, upon a careful reading of *Frisby*, we do not find that its holding defined the outer parameters of 'focused' residential picketing. We hold that plaintiffs did not have a clearly established right on October 10, 1991, to picket in a route encompassing the Bovard residence and the two to three homes on either side of it." *Veneklase I,* 78 F.3d at 1268-69 (footnote omitted).

Further, assuming, *arguendo*, that the arrests were unconstitutionally made, it would [*24] be necessary to show that the City had (a) a policy or custom directly authorizing conduct contravening federal and state constitutions and law; or (b) deficient police training. See *City of Canton v. Harris,* 489 U.S. 378, 385, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989) (determining that municipality may be held liable only for constitutional violations which result from municipal policy or custom). However, the district court rejected any liability against the City on this ground.

Regarding policy or custom, no evidence exists in the record that the City followed a custom of having its police officers arrest picketers who were not in violation of the law. The magistrate judge determined that the City did not have a policy or custom of unconstitutionally applying the ordinance. See *Veneklase,* 904 F. Supp. at 1056 & n. 16. The magistrate judge did observe that the City police chief had admitted

during discovery that the arresting police officers acted pursuant to existing policies and training, none of which specifically addressed the enforcement of the antipicketing ordinance or the implications of Frisby. *Id.* at n. 16. However, since "admissions [*25] are not the equivalent of an affirmative decision, cast in the form of a policy statement, ..." the district court concluded that "municipal liability premised on a ratification theory does not flow from the City's admissions." *Id.*

Regarding deficient police training, no liability can flow from the alleged failure to train the Fargo police officers. This issue has been adequately laid to rest in the district court's opinion in this case:

> In light of the Eighth Circuit's ruling [*Veneklase I*] that the law regarding the parameters of the First Amendment right to protest against abortion in a residential area was not clearly established at the time of plaintiffs' arrest, the City's failure to its train [sic] police officers could not serve as the moving force behind the violation of plaintiffs' First Amendment rights. Since the parameters of plaintiffs' First Amendment rights were still in question, any training of the City's police officers would necessarily leave those parameters in doubt. Consequently, the lack of training by the City cannot be the moving force behind the violation of plaintiffs' constitutional rights.

J.A. at 252, Dist. Ct. Mem. and Order, [*26] April 10, 1997.

Moreover, where arresting police officers are absolved of liability to arrestees, the City ordinarily is not liable. We have addressed this issue in two cases. In *Abbott v. City of Crocker, Mo.*, 30 F.3d 994 (8th Cir. 1994), we held that a judgment as a matter of law could not be sustained against a municipality where the judgment against the arresting officer had been reversed on a fact basis. The court stated:

> The City cannot be liable in connection with either the excessive force claim or the invalid arrest claim, whether on a failure to train theory or a municipal custom or policy theory, unless Officer Stone is found liable on the underlying substantive claim. See *Reynolds v. City of Little Rock,* 893 F.2d 1004, 1007 (8th Cir. 1990), quoting *City of Los Angeles v. Heller,* 475 U.S. 796, 799, 89 L. Ed. 2d 806, 106 S. Ct. 1571 (1986). For this reason, where appellee was not entitled to JAML against the police officer, the grant of JAML against the City was also erroneous.

30 F.3d at 998.

More recently, we reaffirmed Abbott in *Olinger v. Larson,* 134 F.3d 1362 (8th Cir. 1998). There [*27] the plaintiff filed a civil rights action against the arresting officer, the chief of police, and the City of Sioux Falls claiming a violation of constitutional rights stemming from the plaintiff's arrest. The district court initially granted summary judgment dismissing the case against the arresting officer but not dismissing the chief of police and the City because of evidence suggesting a failure to train. Later, the district court entered a new order granting a summary judgment of dismissal on all claims. We affirmed, stating:

> In light of our rulings that Detective Larson and Chief Satterlee did not violate Olinger's fourth amendment rights, Olinger's claims against the City based on its alleged inadequate training and supervision of Detective Larson and Chief Satterlee, must also fail. See *Abbott v. City of Crocker,* 30 F.3d 994, 998 (8th Cir. 1994) (" The City cannot be liable ... whether on a failure to train theory or a municipal custom or policy theory, unless [an officer] is found liable on the underlying substantive claim").

134 F.3d at 1367.

In the absence of a record establishing an illegal arrest, in the circumstances as here where the [*28] arresting officers have been absolved of fault, the plaintiffs-appellees cannot present a tenable basis for affirmance of the judgment against the City on alternative grounds that the arresting officers unconstitutionally applied the ordinance in question.

No basis exists for affirmance on alternative grounds argued by plaintiffs-appellees.

III. CONCLUSION

The judgment against the City of Fargo for damages and assessment of attorney's fees is REVERSED. No costs are awarded on appeal.

**DISSENTBY:**
RICHARD S. ARNOLD

**DISSENT:**
RICHARD S. ARNOLD, Circuit Judge, joined by WOLLMAN, Chief Judge, BOWMAN, BEAM, and MORRIS SHEPPARD ARNOLD, Circuit Judges, dissenting.

Most of the Court's opinion goes to establish the proposition that the Fargo ordinance was content neutral. I do not contest this point. It does not follow, however, that the judgment of the District Court should be reversed. There are at least two closely related alternative grounds for affirmance: that the ordinance was unconstitutionally overbroad, and that it was not narrowly tailored to a substantial state end. Because I believe that both of these grounds have merit, I respectfully dissent.

I.

The question of overbreadth turns [*29] on whether the Fargo ordinance exceeds its constitutional limits in a way that "may cause others not before the court to refrain from constitutionally protected speech or expression," *Broadrick v. Oklahoma,* 413 U.S. 601, 612, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973), and whether its overreaching is "not only ... real, but substantial as well, judged in relation to [its] plainly legitimate sweep." *Id.* at 615.

In rejecting the plaintiffs' overbreadth claim, the Court relies on the statement of the panel in *Thorburn v. Austin,* 231 F.3d 1114 (8th Cir. 2000), that "prohibiting focused residential picketing is plainly legitimate." This categorical statement, by itself, establishes very little. The plaintiffs are not claiming that they have a constitutional right to engage in "focused residential picketing." They couldn't, because the *Frisby* case establishes the contrary. What the plaintiffs do claim is that the Fargo ordinance under which they were arrested encompassed a range of conduct that includes substantially more than just the "focused" or "targeted" residential picketing addressed in *Frisby*. The most important part of the [*30] Court's overbreadth analysis, therefore, is its assertion that "an individual engaged in an activity that is directed at a specific occupant of a dwelling falls within the legitimate sweep of the ordinance." Ante, at *21. This amounts to a holding that picketing is "focused" or "targeted," for Frisby purposes, whenever it is "directed at a specific occupant of a building."

There are two significant problems with this holding. First, it is ambiguous. Because picketing is "a mixture of conduct and communication," *NLRB v. Retail Store Employees,* 447 U.S. 607, 619, 65 L. Ed. 2d 377, 100 S. Ct. 2372 (1980) (Stevens, J., concurring in part and concurring in result), it may be "directed at a specific occupant" in different ways. The picketers may intend the occupant to be the primary recipient of their message, or they may "direct" their picketing towards the occupant in a physical sense. The

distinction makes a difference. The ordinance at issue here prohibits "picketing of dwellings," where "picketing" is defined as the practice of standing, marching or patrolling by one or more persons inside of, in front, or about any premises for the purpose of persuading [*31] an occupant of such premises or to protest some action, attitude, or belief.

As the plaintiffs point out, this definition extends both to protected conduct - marching that is not physically "focused" on a particular residence within the meaning of *Frisby* - and to protected speech -messages that are intended, not only for the occupant of the house, but for the public at large. The Court rejects both of these arguments without clearly addressing either one.

This brings me to the second problem: *Frisby* does not say that picketers lose the shelter of the First Amendment whenever their activity is "directed at a specific occupant of a building," whether as speech or as conduct. Its holding is narrower. In *Frisby*, the Supreme Court was faced with an ordinance that the two lower federal courts had held to be illegally restrictive of constitutionally protected speech. In order to avoid "constitutional difficulties," 487 U.S. at 483, the Court construed the ordinance as prohibiting "only focused picketing taking place solely in front of a particular residence." Id. (emphasis mine). So construed, the ordinance was upheld. See *id.* at 488 [*32] ("largely because of its narrow scope, the facial challenge to the ordinance must fail"). Although the picketing in *Frisby* took place in a public forum, *id.* at 481, its message was forced on an unwilling recipient in the privacy of the home. The Court held that, in that respect, the activity prohibited by the ordinance resembled an offensive radio broadcast, offensive matter sent through the mails, or an offensive speech blared from a sound truck, more closely than it did such protected activities as marching, see *Gregory v. City of Chicago,* 394 U.S. 111, 22 L. Ed. 2d 134, 89 S. Ct. 946 (1968), or distributing leaflets door-to-door, see *Schneider v. State,* 308 U.S. 147, 84 L. Ed.

155, 60 S. Ct. 146 (1939). *Frisby,* 487 U.S. at 485. To the extent that the "plainly legitimate sweep" of a picketing restriction depends upon Frisby, it could extend only to picketing that takes place "solely in front of a particular residence," 487 U.S. at 483, and functions primarily "to force speech into the home of an unwilling listener." *Id.* at 485. Any broader restriction is not "plainly legitimate" and may be unconstitutional. [*33] The remaining question is whether the overbreadth -the range of protected speech the ordinance purports to prohibit -is substantial.

What kinds of activity does the Fargo ordinance attempt to reach? n2 In determining the breadth of the ordinance before it, the *Frisby* Court relied on the town attorney's insistence that his town's ordinance would not be enforced in a variety of probably unconstitutional ways, even though its plain language suggested that it could be. 487 U.S. at 483. In this case, the plaintiffs' attorney asked Fargo Police Chief Ronald Raftevold whether probable cause for arrest would exist if a person holding a picket sign walked up and down a residential street extending for several city blocks, in front of thirty houses, in order to persuade not only a specific resident of the street but also the neighborhood in general. Consider the exchange that followed:

> A. In front of his dwelling was the words you used?
>
> Q. In front of thirty dwellings. He goes back and forth in front of thirty dwellings but he only knows one person who lives in one of those dwellings and his message is very much directed at that person and to all the neighbors. [*34]
>
> A. I would say there was probable cause that he was in violation of that ordinance.
>
> Q. Okay. And if we expand that same fact from thirty

to a hundred houses ... would that change the applicability of the ordinance?

A. I don't believe so.

Q. Okay. And your police force was authorized to enforce it that way.

A. They were authorized to enforce it if they had probable cause to believe that that ordinance was being violated.

Q. On the hypotheticals I just gave you you felt there was probable cause in those cases of thirty houses and a hundred houses so long as the picketing intent and to persuade and to protest one person there was present.

MR. MILLER: Asked and answered, Counsel.

JA 243-45.

n2 The Court focuses on the circumstances under which the ordinance was applied, apparently taking the view that the plaintiffs' overbreadth claim must fail as long as the city could constitutionally prohibit the kind of conduct for which the plaintiffs were actually arrested. That is incorrect. The plaintiffs claim that the ordinance was overbroad on its face, not merely as applied to them. In evaluating the facial challenge, we must look not only at how the ordinance has actually been enforced, but, more importantly, at what sort of enforcement it authorizes. It is worth noting, however, that, according to the police incident reports, the plaintiffs were arrested for marching silently back and forth in front of a six-house group: the Bovard residence, two houses on one side of it, and three on the other. JA 189, 191, 194-95. This fact by

itself prevents us from saving the ordinance by adopting a construction as narrow as the one in *Frisby*.

[*35]

Chief Raftevold's interpretation submerges the Fargo ordinance in the very same "constitutional difficulties" that the *Frisby* court sought to escape by holding that the ordinance in that case extended to "picketing ... directed at a single residence," but not to "general marching through residential neighborhoods, or even walking a route in front of an entire block of houses ...." *Frisby*, 487 U.S. at 483. Even at the time of *Frisby*, Justice White's concurring opinion suggested that without the saving grace of that interpretation, the ordinance in *Frisby* would have been overbroad. *Id.* at 491 (White, J., concurring in judgment). Since then, the *Madsen* case has made clear that *Frisby* cannot be interpreted to justify a 300-foot "buffer zone." See *Madsen, supra*, 512 U.S. at 774-75; see also *Lucero v. Trosch*, 121 F.3d 591, 606 (11th Cir. 1997) (striking down 200-foot residential buffer zone; stating that "the Court's discussion [in *Madsen*] makes clear that its precedents support restriction of targeted picketing rather than a generalized restriction").

In our case, the City of Fargo claims [*36] that its picketing ordinance was modeled on the one in *Frisby*. Its plain language casts at least as wide a net. The difference, however, is that Fargo's ordinance cannot be saved by a narrowing construction. As it was interpreted by the leading city official charged with its enforcement, the ordinance reached substantially beyond the "plainly legitimate scope" established in *Frisby*. Accordingly, I would hold that it was facially overbroad.

II.

For some of the same reasons, the ordinance was not narrowly tailored to a significant governmental interest. It is true that the state's interest in protecting residential privacy is

significant. *Frisby* shows that. 487 U.S. at 484. But *Frisby* also establishes that a complete ban on a species of communication "can be narrowly tailored ... only if each activity within the proscription's scope is an appropriately targeted evil." *Id.* at 485. If the First Amendment permits a city to criminalize marching up and down a residential street, with persuasive intent, in front of thirty or even a hundred houses, provided only that the picket goes past one targeted residence in the course of the march, then it is hard to imagine what [*37] kind of "constitutional difficulties" the *Frisby* Court could have had in mind. In addition, the actual application of the ordinance here - to picketing in front of six houses, according to the Fargo police themselves - plainly went beyond *Frisby's* reference to "picketing taking place solely in front of a particular residence ...." 487 U.S. at 483. The *Frisby* Court's interpretation, unavailable here, was necessary to its holding on the issue of narrow tailoring. Because we cannot adopt such an interpretation, we should reach the contrary result.

In addition to *Frisby,* the Court claims that *Hill v. Colorado,* 530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000), "strongly supports the rejection of plaintiffs' alternative theories of constitutional imperfection in the Fargo ordinance." This claim adds nothing to the argument. *Hill* dealt with a statute that marked off an eight-foot area around anyone in a public right-of-way within 100 feet of a health-care facility. The statute made it a misdemeanor knowingly to enter that area, without the person's consent, in order to protest, counsel, educate, or hand out pamphlets. *Hill,* 120 S. Ct. at 2484 n. 1. [*38] An eight-foot zone around a person's body is manifestly different from a zone of one hundred, thirty, or even five houses around a residence. In case this should be in doubt, the *Hill* Court explicitly stated that the Colorado ordinance "interfered far less with a speaker's ability to communicate than did the total ban on picketing on the

sidewalk outside a residence (upheld in *Frisby v. Schultz*) ...." Id. at 2497. If *Frisby* does not help Fargo, neither can *Hill*.

III.

I believe the City is liable here. The ordinance is invalid on its face. A municipality faced with a § 1983 action cannot plead qualified or absolute immunity, nor is the good faith of its officers a sufficient defense. See *Owen v. City of Independence, Missouri,* 445 U.S. 622, 638, 63 L. Ed. 2d 673, 100 S. Ct. 1398 (1980). A city is liable for damages under § 1983 if its officers deprive someone of liberty pursuant to a facially unconstitutional municipal ordinance. See, e.g., *Douglas v. Brownell,* 88 F.3d 1511 (8th Cir. 1996) (denial of parade permit pursuant to overbroad permit ordinance); *Gerritsen v. City of Los Angeles,* 994 F.2d 570 (9th Cir. 1993) [*39] (arrest pursuant to overbroad prohibition on demonstrating in a public park without a permit). The Fargo police did just that.

I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-2147

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| Chris Veneklase, et al., | ) | |
| | ) | |
| Appellees, | ) | Appeal from the United |
| | ) | States District Court for |
| v. | ) | the District of North |
| | ) | Dakota |
| City of Fargo, | ) | |
| | ) | |
| Appellant. | ) | |

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgement of the district court in this cause is reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this court.
(5120-010199)

February 13, 2001

A true copy.

Attest: /s/
Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-2147

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| | ) | |
| Appellant. | ) | |

There being no provision authorizing such reconsideration, the petition for en banc reconsideration of Judge Bye's decision not to recuse himself from participating in the above-entitled matter is denied.
(5120-010199)

January 17, 2001

Order Entered at the Direction of the Court:

/s/
Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-2147

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| | ) | |
| Appellant. | ) | |

Appellees' motion for reconsideration of the denial of recusal has been considered by Judge Bye and is denied. (5120-010199)

January 12, 2001

Order Entered at the Direction of the Court:

/s/
Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

Chris Veneklase; Paul B. Mehl; Darold Larson; Nancy Emmel; Jessica Uchtman, Plaintiffs-Appellees, v. City of Fargo, Defendant-Appellant, David Eugene Todd, Officer, City of Fargo Police Department; Jon Holman; Wayne Jorgenson, Defendants.

No. 98-2147

**UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

236 F.3d 899; 2000 U.S. App. LEXIS 33209

October 25, 2000, Submitted
December 13, 2000, Filed

**COUNSEL:**
For CHRIS VENEKLASE, PAUL B. MEHL, DAROLD LARSON, NANCY EMMEL, JESSICA UCHTMAN, Plaintiffs - Appellees: Peter B. Crary, Thomas W. Condit, Milford, OH.

For CITY OF FARGO, Defendant - Appellant: Mike Miller, SOLBERG & STEWART, Fargo, ND.

**OPINIONBY:**
BYE

**OPINION:**
[*900]
MEMORANDUM AND ORDER CONCERNING PLAINTIFFS' MOTION TO RECUSE

BYE, Circuit Judge.

The plaintiffs-appellees in this matter have previously

filed a motion seeking my recusal from this case currently pending before the court *en banc*. For the reasons set forth below, I decline to recuse.

I.

This lawsuit originated in 1991. The plaintiffs were arrested on October 10, 1991, pursuant to the City of Fargo's anti-residential-picketing ordinance while participating in a public prayer vigil outside the home of Jane Bovard. At that time, Bovard served as director of the Fargo Women's Health Organization ("the clinic"), an abortion service provider. The charges against plaintiffs were dismissed by the Cass County, North Dakota, court when it found the ordinance was unconstitutionally applied to them. Thereafter, plaintiffs-appellees filed suit against the City of Fargo, alleging, *inter alia*, violations of their First Amendment rights.

This matter has previously been before this court twice. See *Veneklase v. City of Fargo*, 78 F.3d 1264 (8th Cir. 1996); [**2] *Veneklase v. City of Fargo*, 200 F.3d 1111 (8th Cir. 1999) (vacated February 16, 2000). After the second panel decision was rendered, the full court decided to rehear the matter *en banc*. Oral argument was heard on April 11, 2000. I took office on April 22, 2000; thus, I did not participate in oral argument. However, pursuant to the Eighth Circuit's long-established procedure, all active judges are permitted to participate in the decision.

In September of this year, the court ordered additional briefing on the application of the Supreme Court's latest First Amendment decision, *Hill v. Colorado*, 530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000). Along with their supplemental brief, appellees filed a motion to disqualify me. It is premised on the fact that the law firm of which I was a member prior to becoming a judge, Vogel, Weir, Hunke, & McCormick, Ltd., of Fargo, North Dakota (the "Vogel law firm"), had represented Fargo Women's Health Organization in

two cases at approximately the same time the appellees were arrested. One case was a medical malpractice action, in which both Bovard and the clinic were named defendants. See *Sabot v. Fargo Women's Health Org.*, Inc., 500 N.W.2d 889 (N.D. 1993). [**3] The other, with the clinic as the plaintiff, was a civil rights suit against the state seeking declaratory and injunctive relief from the North Dakota Abortion Control Act. See *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526 (8th Cir. 1994).

None of the *Veneklase* plaintiffs were parties to either of those lawsuits. Further, neither Bovard nor the clinic is or has been a party in this litigation, although [*901] Bovard was called to testify as a witness as to the plaintiffs' damages. The Vogel law firm has never been involved in any manner in this litigation, nor has it ever represented any of the *Veneklase* plaintiffs or the appellant in any other matter. Neither Bovard nor the clinic were at any time in the past ever personal clients of mine. I was never involved as a lawyer or otherwise in any of the matters in which my former law firm several years ago represented them.

Appellees' motion is filed pursuant to 28 U.S.C. § 455(a), which provides that "any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 445 [**4] (a). They allege that my prior association with the Vogel law firm, because of its past representation of Bovard and the clinic, gives my participation in the *en banc* proceedings the appearance of impropriety. Plaintiffs state that, although none of the Plaintiffs in this case were parties in those two cases, and although Bovard is not a party in this case, the center of the controversy in this case revolves around the Plaintiffs' reaction to Bovard's role in the abortion business and Bovard's (and the City's) claim that she was the victim of unlawful targeted picketing. There is an obvious appearance of impropriety in Judge Bye's participation under such

circumstances.

II.

"Drawing the balance between a judge's competing obligations to dispose expeditiously of those matters that properly come before him, and to disqualify himself in those instances in which his impartiality might legitimately be questioned, is often a difficult endeavor." Richard E. Flamm, Judicial Disqualification --Recusal and Disqualification of Judges 144 (1996). This court has observed that the standard to be used in deciding whether to recuse is an objective one: "Would the average [**5] person, knowing the facts alleged by the parties seeking disqualification, question the Judge's impartiality, and, if so, would the question be reasonable?" *O'Bannon v. Union Pac. R.R. Co.*, 169 F.3d 1088, 1091 (8th Cir. 1999).

After consulting with other judges outside of this circuit and studying both caselaw and scholarly texts on the subject of recusal, I decline to recuse myself. My former law firm's representation of Jane Bovard and the Fargo Women's Health Organization in isolated, unrelated litigation going back six and seven years prior to my taking the bench, simply cannot and does not create an appearance of impropriety to an average person, knowing the facts of this situation.

Jane Bovard is not a party in this case. Nor is she even an interested third party with a stake in the outcome. The ordinance at issue in this case has been amended; if plaintiffs or others picket outside Bovard's home in the future, they may still be arrested, but under a different anti-residential picketing ordinance. The court's decision as to the constitutionality of this ordinance therefore has no practical effect on Bovard.

Even if Bovard had an interest in this matter, my [**6] former law firm never represented her in connection with this case. Section 455(b) lists specific situations in which a judge must recuse himself or herself from participation in a case; one

of these situations is "where in private practice he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter...." 28 U.S.C. § 445(b)(2). My situation is several steps removed from that described in § 445(b)(2); it is so far removed from a case in which actual bias may be found as to make even the appearance of bias improbable.

Canon 3c(1) of the Code of Conduct for United States Judges tracks almost identically the wording contained in 28 U.S.C. § 455. The Canon does not require recusal. It has been in excess of six years since my former law firm represented the [*902] clinic in *Schafer* and seven years since the firm defended Bovard and the clinic in *Sabot*. I never had any professional or personal relationship of any kind or nature with either, and most certainly no involvement as a lawyer in any of those cases which took place in the early [**7] part of the 1990's.

Viewing all of the circumstances in the light cast by Canon 3c(1) or § 455, recusal is simply not required in these circumstances. A reasonable person with the full knowledge of all relevant facts would not conclude that my impartiality might be impaired. Therefore, I need not discuss appellees' charge of impropriety in my not revealing these circumstances.

No cases have been found in which a judge has been asked to recuse himself or herself based on a similar factual scenario. Research has produced only one analogous situation in the Eighth Circuit. In *Patterson v. Masem*, 774 F.2d 251, 254 n.2 (8th Cir. 1985), this court upheld a district court judge's decision not to recuse himself where "Judge Woods' former law firm, during the time he was associated with the firm, represented parties that sought to intervene in and eventually participated as *amicus curiae* in [related] litigation." The court noted that "no circumstances have been brought to our attention that would cause a reasonable person to question

Judge Woods' ability to impartially decide [plaintiff's] case." *Id.* n1 Likewise, the circumstances of this matter are such that no [**8] reasonable person could or would question my impartiality. The facts of *Veneklase* are far too attenuated from my former law firm's previous representation of Bovard and the clinic to raise legitimate concerns about it.

> n1 Appellees analogize this situation to one in which a judge (or his former law firm) previously represented the victim of a crime and then sits in judgment against the perpetrator of the crime. Plaintiffs cite no cases in which such a situation has required recusal of the judge.

My participation in this *en banc* matter will continue. I will decide the matter based solely and strictly upon my understanding of the governing law as applied to the facts of this case. Appellees' recusal motion is denied.

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-2147NDF

| | | |
|---|---|---|
| Chris Veneklase, et al., | ) | |
| | ) | |
| Appellees, | ) | Appeal from the United |
| | ) | States District Court for |
| v. | ) | the District of North |
| | ) | Dakota |
| City of Fargo, | ) | |
| | ) | |
| Appellant. | ) | |

The April 11, 2000, submission to the court *en banc* is vacated. The appeal will be resubmitted to the court *en banc* without oral argument, the Honorable Kermit E. Bye participating, on the basis of the original briefs and supplemental briefs. The parties are directed to file by October 6, 2000, simultaneous supplemental briefs, not to exceed 20 pages, on te following questions:

1. Does the decision in *Hill v. Colorado*, 120 S.Ct. 2480 (2000), have any bearing on the question of the invalidity, facial or as-applied, of the 1985 Fargo ordinance at issue in this case.

2. Whether the holding of *Frisby v. Schultz*, 487 U.S. 474 (1988), limits the 1985 ordinance's scope of picketing in front of only one house, or "[w]hether protesters may, consistent with the *Frisby* holding, include houses adjacent to the targeted dwelling on the picketing route." See *Veneklase v. City of Fargo*, 78 F.3d 1264, 1268 (8th Cir. 1996).
(5120-010199)

F2

September 7, 2000

Order Entered at the Direction of the Court:

/s/

Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

G1

Chris Veneklase, Paul B. Mehl, Darold Larson, Nancy Emmel, Jessica Uchtman, Appellees, vs. City of Fargo, Appellant.

No. 98-2147NDF

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

2000 U.S. App. LEXIS 2255

February 16, 2000, Decided

OPINION:

The petition for rehearing *en banc* is granted. The opinion and judgment filed December 30, 1999, are vacated. The court *en banc* will hear oral argument in this case on Tuesday, April 11, 2000, at 11:00 a.m. in St. Louis, Missouri. Each side will be allotted twenty (20) minutes for argument.

February 16, 2000

H1

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-2147

| | | |
|---|---|---|
| Chris Veneklase, Paul B. Mehl, Darold Larson, Nancy Emmel, and Jessica Uchtman, | ) | |
| Plaintiffs - Appellees, | ) | Appeal from the United States District Court for the District of North Dakota |
| vs. | ) | |
| City of Fargo, | ) | [PUBLISHED] |
| Defendant - Appellant, | ) | |
| David Eugene Todd, Officer, City of Fargo Police Department, Jon Holman, Wayne Jorgenson | ) | |
| Defendants. | ) | |

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Submitted: May 13, 1999
Initially Filed August 30, 1999
Opinion Vacated and Rehearing Granted: September 28, 1999

Refiled as Modified: *December 30, 1999

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Before McMILLIAN, BRIGHT, AND FAGG, Circuit Judges.

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* Appellees, Chris Veneklase, Paul B. Mehl, Darold Larson, Nancy Emmel and Jessica Uchtman, have filed a petition for rehearing with a suggestion for rehearing *en banc*. They assert in their petition that the rule of stare decisis compels this court to affirm the district court due to the decision in *Kirkeby v. Furness*, 92 F.3d 655 (8th Cir. 1996) ("*Kirkeby II*"); that the distinction drawn by this panel opinion initially filed on August 30, 1999, is invalid; and that, among other things, the Fargo picketing ordinance is facially unconstitutional for reasons given in *Kirkeby II*. In essence, Appellees assert that the principal issues in this appeal are not governed by *Kirkeby II*. Therefore, Appellees argue, we should affirm, or at least remand for a new trial.

This panel granted a rehearing to reconsider whether we are bound to affirm the district court's determination that the Fargo ordinance is unconstitutional based on *Kirkeby II*. This precise question of whether the Fargo picketing ordinance can be properly distinguished from that in *Kirkeby v. Furness*, 52 F.3d 772 (8th Cir. 1995) ("8th Cir. 1995) ("Kirkeby I") and *Kirkeby II* had not been previously briefed by the parties; that issue first surfaced at oral argument. The panel believed it proper under those circumstances to grant the petition for rehearing before the panel so that we could reconsider the issue upon written arguments in the petition and upon appellant's response.

Having reconsidered the matter, we now re-adopt and restate the prior opinion of the panel, and, in addition, further comment on the panel's analysis in distinguishing the ordinance in *Kirkeby II* from the Fargo ordinance in this case. We also comment on other issues raised in the petition for rehearing.

The additional commentary as Part III immediately precedes the conclusion of our opinion on the final page.

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PER CURIAM.

The City of Fargo ("Fargo") appeals from a summary judgment decision holding Fargo's 1985 residential picketing ordinance unconstitutional on its face; a jury award of damages in the amount of $2,431; and an award of attorneys' fees against Fargo. We conclude that the Fargo 1985 residential picketing ordinance constitutes a constitutional, content-neutral regulation of free speech enacted to protect the privacy of Fargo's residents in their homes. We, therefore, reverse and remand for entry of judgment dismissing the action.

## I. BACKGROUND

This case has an extensive, almost eight-year history. In Fargo, North Dakota, on October 10, 1991, at approximately 10:00 p.m., activists picketed the home of an abortion clinic administrator and one or two houses on either side of her home. The Fargo Police Department received a complaint about the residential picketing. Fargo police officers advised the picketers that their conduct violated Fargo's then applicable residential picketing ordinance.

Fargo's ordinance, enacted in 1985, reads as follows:

> 10-1201. Definitions. – For purposes of this article, certain words and phrases used herein are defined as follows:
>
> > A. "Dwelling" means any structure or building, or dwelling unit within a building, which is

> used as a place of residence.
>
> B. "Picketing" means the practice of standing, marching, or patrolling by one or more persons inside of, in front, or about any premises for the purpose of persuading an occupant of such premises or to protest some action, attitude or belief.
>
> 10-1202. Picketing of dwellings prohibited. –No person shall engage in picketing the dwelling of any individual in the City of Fargo.

Jt. App. at 2.[1]

After the picketers refused to leave the scene, the Fargo police arrested the picketers and charged them with violating the ordinance. The Fargo police transported the plaintiffs to the Cass County Jail and held them overnight.[2] The Fargo police detained plaintiff Uchtman, a minor at the time of her arrest, for only a few hours and released her to the custody of her parents. Fargo filed charges against plaintiffs Veneklase, Mehl, Larson and Emmel for violating the residential picketing ordinance. On February 18, 1992, Cass County Judge Frank L. Racek dismissed the charges against plaintiffs, deciding that the ordinance was unconstitutional on

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1 The ordinance in question here was subsequently amended by the Fargo City Council on February 1, 1993.

2 The picketers would have been released that night if they had paid a $50 bond.

its face but unconstitutional as applied to the plaintiffs on October 10, 1991.

Plaintiffs subsequently filed this action, pursuant to 42 U.S.C. § 1983, against Fargo, Officer David Todd, Officer Jim Schalesky, Lieutenant Jon Holman, and Sergeant Wayne Jorgenson seeking redress for their arrest and incarceration. On February 17, 1995, a Magistrate Judge[3] denied the individual police officers' claim of qualified immunity. The district court concluded that the officers' conduct was not "objectively reasonable" in light of clearly established law. The district court also concluded that Fargo failed to train its officers properly and, as a result, was "deliberately indifferent" to the rights of the picketers and liable for damages as a matter of law. *Veneklase v. City of Fargo*, 904 F. Supp. 1038, 1058(D.N.D. 1995). In addition, the district court concluded that the ordinance did not violate the constitution on its face because the ordinance constituted a valid content-neutral regulation. *Id.* at 1044-48. Fargo and the police officers appealed to this court from the interlocutory order. We reversed the denial of qualified immunity and held that the interlocutory appeal on the issue of municipal liability was not properly before the court. *Veneklase v. City of Fargo*, 78 F.3d 1264, 1270(8th Cir. 1996) ("*Veneklase I*"). We then remanded the case to the district court for further proceedings against Fargo. *Id.*

On April 10, 1997, the district court determined that Fargo was liable as a matter of law and again granted summary judgment in favor of the plaintiffs. The district court concluded that the ordinance was unconstitutional as a content-based restriction on free speech. The district court then referred the issue of damages to a jury for a trial. That trial, held in August 1997, resulted in

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3 A United States Magistrate Judge for the District of North Dakota presided with the consent of the parties. *See* 28 U.S.C. § 636(c).

damages against Fargo in favor of the five plaintiffs in the total sum of $2,431. On March 31, 1998, the district court awarded attorneys' fees and costs against Fargo in excess of $52,000. Fargo timely appeals.

## II. DISCUSSION

Fargo argues that the district court erred when it held that the definition of "picketing" in Fargo's 1985 residential picketing ordinance failed the content-based speech test, and it further asserts that the ordinance is valid on its face under the First Amendment of the Constitution. We agree with these contentions. The Fargo ordinance constitutes a valid content-neutral regulation of speech under the First Amendment.

The residential streets of Fargo comprise traditional public fora and regulations of residential picketing are thus governed by the stringent standards established by the Supreme Court for limitations on free speech in public fora. See *Frisby v. Schultz*, 487 U.S. 474, 481 (1988). The Court articulated these standards in *Frisby*:

> In these quintessential public for[a], the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.... The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

*Id.* (Quoting *Perry Educ. Ass'n. V. Perry Local Educators'*

*Ass'n.*, 460 U.S. 37, 45 (1983)).

To determine content neutrality in a speech regulation, we must decide "whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994) (alteration in original) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). "The government may not regulate [speech] based on hostility - or favoritism - towards the underlying message expressed." *Turner*, 512 U.S. at 642 (alteration in original) (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992)). Content-based ordinances "by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed...." *Turner*, 512 U.S. at 643. Content-neutral ordinances, for the most part, "confer benefits or impose burdens on speech without reference to the ideas or views expressed...." *Id.*

Fargo maintains that this case is governed by the Supreme Court's decision in *Frisby*. In 1988, the Court held that an ordinance in Brookfield, Wisconsin, worded almost identically to the Fargo residential picketing ordinance, was facially constitutional. See *Frisby v. Schultz*, 487 U.S. 474(1988). The Brookfield ordinance made it "unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." Id. at 477. The Supreme Court deferred to the lower federal court's interpretation that the ordinance was content neutral. The Court concluded that the ordinance preserved ample alternative means of communication after interpreting the ban in the ordinance to restrict only "focused picketing taking place solely in front of a particular residence...." Id. at 483. The Court further concluded that the ordinance served the significant government interest of protecting residential privacy. Id. at 484. The court decided that the town narrowly tailored the focused

picketing ban to address only the resident "trapped within the home." Id. at 487-88. The only substantive difference between the ordinance in *Frisby* and the 1985 Fargo ordinance is that Fargo added definitions to clarify the ordinance.

On its face, the ordinance's definition of picketing does not burden speech "because of disagreement with the message it conveys." See *Ward*, 491 U.S. at 791. Fargo did not prohibit picketing by activists opposed to abortion because of their message. Instead, Fargo prohibited the conduct of all picketing directed at a particular occupant in order to protect the tranquility and privacy of the home. Fargo's purposes for enactment of the ordinance do not in any way relate to the content of the expression. In other words, any picketing in front of a person's home would violate that resident's privacy, even if the resident happened to agree with the message. Any message of any kind can constitute picketing when directed at a particular occupant of a home. The circumstances relating to targeted picketing of an individual's home and the invasion in that way of an individual's peace and tranquility is entirely different than picketing on a public street, road or park where the message is directed to the public at large. "The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791.

The picketers argue that this case is controlled by *Kirkeby v. Furness*, 92 F.3d 655 (8th Cir. 1996) ("*Kirkeby II*"). In *Kirkeby II*, this court concluded that the picketing definition in the later 1993 Fargo residential picketing ordinance was content based. The 1993 ordinance defined "picketing" as "standing, marching, sitting, lying, patrolling or otherwise maintaining a physical presence inside of, in front, or about any premises for the purpose of persuading the public or an occupant of such premises or to protest some action,

attitude or belief." *Kirkeby II*, 92 F.3d at 659 (quoting Fargo Municipal Code, art. 10-0801(2)) (emphasis added). However, as the plaintiffs acknowledge, the 1993 ordinance in *Kirkeby II* "is more complicated because of its effort to define and regulate 'targeted' residential picketing...."[4] *Frisby*, 487 U.S. at 486 (emphasis added).

We, therefore, reject the picketers' contention that *Kirkeby II* controls this court's determination whether Fargo's 1985 residential picketing ordinance is a constitutional regulation. The different focus in *Kirkeby II* on picketing the public underlies the court's ruling that the ordinance in that case did not operate in a content-neutral environment. As explained above, the ordinance in this case is a content-neutral regulation enacted to protect the sanctity of the

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> 4 The [1993] ordinance, as amended, prohibits "targeted residential picketing." Fargo Municipal Code, art. 10-0802. Targeted residential picketing is defined as picketing that identifies an occupant (either orally or in writing) within two hundred feet of a dwelling, blocking access to a dwelling, or maintaining a presence within seventy-five feet of a dwelling for longer than five minutes at a time. Fargo Municipal Code, art. 10-0801(4). The ordinance also gives the Board of City Commissioners the authority to declare, at the request of a complaining resident, the resident's block a "Restricted Picketing Zone" in which picketing may be limited or prohibited outright. Fargo Municipal code, art. 10-0804.

*Kirkeby II*, 92 F.3d at 658.

home.[5]

Fargo's ordinance also is narrowly tailored to address only the 'evil" of targeted picketing of a particular resident. See *id.* at 487. That "evil" forces a resident to be "figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing [leaves the resident] with no ready means of avoiding the unwanted speech." *Id.* Thus, under *Frisby*, Fargo's 1985 picketing ordinance constitutes a valid content-neutral regulation of speech to preserve home tranquility and privacy by regulating focused picketing.

The picketers argue that the district court's decision, the jury award of damages and the award of attorney fees can be affirmed on alternative grounds. However, the picketers' constitutional challenges of over breadth and vagueness also fail under *Frisby*. See *Frisby*, 487 U.S. 474. Adding the definitions of "dwelling" and "picketing" does not make the ordinance overbroad or vague.

The ordinance is not overbroad for the same reasons that the

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5 Our conclusion that Fargo's 1985 residential picketing ordinance constitutes a content-neutral regulation is amply supported by decisions of the Supreme Court and the Eighth Circuit. See *Frisby v. Schultz*, 487 U.S. 474 (1988); *Carey v. Brown*, 447 U.S. 455 (1980) (picketing ordinance not facially neutral because a provision specifically excluded labor picketing); *United States v. Dinwiddie*, 76 F.3d 913, 923 (8th Cir. 1996)("FACE's [Freedom of Access to Clinic Entrances Act of 1994] motive requirement does not discriminate against speech or conduct that expresses an abortion-related message. FACE would, for example, apply to anyone who blockades a clinic to prevent a woman from getting an abortion, regardless of the message expressed by the blockade."); *Douglas v. Brownell*, 88 F.3d 1511 (8th Cir. 1996) (concluding residential picketing ordinance was constitutional under *Frisby* as a content-neutral ban limited to focused picketing in three-house zone.).

residential picketing ordinance is narrowly tailored. "A statute is unconstitutionally overbroad if 'it reaches a substantial number of impermissible applications.'" *Dinwiddie*, 76 F.3d at 924 (quoting *New York v. Ferber*, 458 U.S. 747, 771 (1982)). Fargo's residential picketing ordinance allows picketers to engage in neighborhood picketing including picketing across the street from the targeted resident. The activity proscribed is the very narrow range of activity–focused picketing directed at "an occupant." The picketers' message can be expressed in many alternative forms making the ordinance not overbroad.

The picketers also contend that the ordinance is vague because it lacks standards and vests too much discretion in the officers enforcing the ordinance.[6] In order "[t]o 'survive a vagueness challenge, [an ordinance] must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited and provide explicit standards for those who apply [the ordinance].'" *Dinwiddie*, 76 F.3d at 924 (quoting *Video Software Dealers Ass'n v. Webster* 968 F.2d 684, 689 (8th Cir. 1992)) (internal quotation omitted). We conclude that Fargo's ordinance, with its clear definitions of both dwelling and picketing, places people of ordinary intelligence on notice of what conduct the ordinance regulates.[7] The ordinance and case law provide the

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6 In particular, the picketers claim that the ordinance may include walking silently without signs which would allow for standardless discretion in the police applying the statute. We have already rejected the argument that silent prayer in front of a person's home does not amount to picketing. See *Douglas*, 88 F.3d at 1521.

7 We note that *Kirkeby II* did conclude that the definition of picketing in that case was unconstitutionally vague. Judge Gibson, however, indicates in his dissent in *Kirkeby II* that the majority's vagueness discussion constitutes dicta. *Kirkeby II*, 92 F.3d at 662-

police with explicit standards. Thus, Fargo's ordinance is not vague.

Lastly, the picketers argue that the ordinance was unconstitutional as applied to them. This argument fails because this court held in this case's first appeal, *Veneklase I*, that the police officers who arrested the picketers acted in an "objectively reasonable" manner. 78 F.3d at 1269. In that case, the court concluded that when "at least one protester remains in front of the targeted residence at all times, the fact that other protestors march in front of several houses adjacent to the targeted dwelling does not diminish the 'focused' character of the picketing." *Id.* at 1268. Under *Frisby*, the picketers had no constitutional right to engage in focused picketing of a particular occupant. See *Frisby*, 487 U.S. 474. Therefore, Fargo applied its ordinance in a constitutional manner on October 10, 1991.

## III. ADDITIONAL COMMENTARY

We begin these comments by examining the term "picketing." We compare the term as contained in the Fargo ordinance with the term "picketing" as used in the Brookfield, Wisconsin ordinance at issue in *Frisby v. Schultz*, 487 U.S. 474 (1988). The Brookfield ordinance made it "unlawful for any person to engage in picketing before or about the residence or dwelling of any individual..." *Id.*

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63 (Gibson, J.,J., dissenting). Regardless of whether the discussion of the issue by the majority in *Kirkeby II* qualifies as dicta, the vagueness challenge in this case is without merit in the context of targeted residential picketing of an occupant. The picketing definition has a clear meaning. A protestor targeting the occupant of a residence by picketing the occupant's dwelling knows what he or she is doing and that such conduct violates Fargo's ordinance.

at 477. The ordinance recited the primary purpose of the ban: "'the protection and preservation of the home 'through assurance' that members of the community enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy.'" *Id.* at 477.

The language of the Fargo ordinance is substantially the same as the Brookfield ordinance in *Frisby*. The Fargo ordinance provides that "[n]o person shall engage in picketing the dwelling of any individual in the City of Fargo." Jt. App. at 7. The preceding section of the Fargo ordinance defines "picketing" as "the practice of standing, marching, or patrolling by one or more persons inside of, in front, or about any premises for the purpose of persuading an occupant of such premises or to protest some action, attitude or belief." Jt. App. at 7.

The appellees have not drawn any particular distinction between the ordinance in *Frisby* and the Fargo ordinance. Indeed, an examination of *Frisby* demonstrates that the term picketing includes all of the conduct that is defined by the Fargo ordinance and even more. We quote from portion of the *Frisby* case:

> AS JUSTICE WHITE'S concurrence recounts, the lower courts described the ordinance as banning "all picketing in residential areas." ...But these general descriptions do not address the exact scope of the ordinance and are in no way inconsistent with our reading of its text. "Picketing," after all, is defined as posting at a particular place, see Webster's Third New International Dictionary 1710 (1981), a characterization in line with viewing the ordinance as limited to activity focused on a single residence.
>
> *Frisby*, 487 U.S. at 482 (citation omitted).

Thus, generally speaking, "picketing would be having the

> picket proceed on a definite course or route in front of a home." Tr. Of Oral Arg. 8. The picket need not be carrying a sign, *Id.*, at 14, but in order to fall within the scope of the ordinance the picketing must be directed at a single residence, *Id.*, at 9. General marching through residential neighborhoods, or even walking a route in front of an entire block of houses, is not prohibited by this ordinance. *Id.*, at 15. Accordingly, we construe the ban to be a limited one; only focused picketing taking place solely in front of a particular residence is prohibited.
>
> *Id.* at 483.
>
> The type of focused picketing prohibited by the Brookfield ordinance is fundamentally different from more generally directed means of communication that may not be completely banned in residential areas....Here, in contrast, the picketing is narrowly directed at the household, not the public. The type of picketers banned by the Brookfield ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way. Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy. The devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt.
>
> *Id.* at 486 (citations omitted).

The general term picketing in the Brookfield ordinance may carry a broader prohibition than that of Fargo's ordinance. *Frisby* focuses on "the evil" of targeted residential picketing as about "the

very presence of an unwelcome visitor at the home." *Id.* at 487 (quoting *Carey v. Brown*, 447 U.S. 455, 478 (1980)). The Brookfield ordinance analyzed in *Frisby* covered all activities that come under the general term of picketing, with the possible exception that this ordinance may not apply to a home used as a place of business or to picketers present in a particular home by invitation of the resident. See *id.* at 488. Clearly the specific conduct of picketing as defined in the Fargo ordinance falls well within the parameters of picketing as explained in *Frisby*.

The importance of protecting the home from focused picketing is emphasized by the following quotation from Justice Rehnquist's opinion in *Carey*: "'To those inside...the home becomes something less than a home when and while the picketing...continue[s]....[the] tensions and pressures may be psychological not physical, but they are not, for that reason less inimical to family privacy and truly domestic tranquility.'" *Id.* at 486 (Rehnquist, J., dissenting) (quoting *Wauwatosa v. King*, 182 N.W.2d 530, 537 (Wis. 1971)).[8]

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8 The general definition of picketing in the Brookfield ordinance would encompass all of the activity that the Fargo ordinance designates as the practice of standing, marching or patrolling. The addition of the term "for the purpose of persuading or to protest" is part and parcel of the very definition of picketing.

Black's Law Dictionary defines picketing as:

> The demonstration by one or more persons outside a business or organization to protest the entity's activities or policies and to pressure the entity to meet the protesters' demands; esp., an employees' demonstration aimed at publicizing a labor dispute and influencing the public to withhold business from the employer.

Without a doubt, *Frisby* makes clear that picketing means conduct or speech that is intended to "protest" or "persuade" in the same manner as those words are expressed in the Fargo ordinance.[9]

We precisely follow the analysis in *Frisby* in distinguishing the present Fargo ordinance protecting the privacy of the home and limiting the scope of that protection to the target resident. As the Court stated in *Frisby*, "The type of focused picketing prohibited by the Brookfield ordinance is fundamentally different from ore generally directed means of communication that may not be completely banned in residential areas." *Id.* at 486.

The appellees argue that *Kirkeby II* requires this court to hold that the ordinance here is content based because it is, for all practical purposes, the same ordinance as in *Kirkeby II*. We disagree. As we discuss in our opinion, the focus of the ordinance in *Kirkeby II* related to picketing that was intended to persuade the public. The Fargo ordinance at issue now does not apply to the public, but merely applies to focused picketing, i.e., picketing that targets one residence.

Further, because there are two separate ordinances at issue, we are not bound by the *Kirkeby II* panel's decision. As a general proposition, the principle of stare decisis is applicable only where facts in the two actions are the same. See *United States v. Nolan*,

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Black's Law Dictionary 1167 (7th ed. 1999) (emphasis added).

9 It is well to note also that the only question about content neutrality in *Frisby* was whether the Brookfield ordinance should be read as containing under state law an implied exception for labor picketing. See *Frisby*, 487 U.S. at 481. The appellants in *Frisby* contended that the ordinance would thereby distinguish between prohibited and permitted speech on the basis of content. The Supreme Court rejected this argument, accepting the interpretation of the state statute by the inferior federal courts. See *id.* at 481.82.

136 F.3d 265, 269 (2d Cir. 1998). Under stare decisis rule, language and general expressions in a court's opinion should be limited to particular facts and issues involved and must be construed in light of issues presented. See *Mutual Benefit Health & Accident Ass'n v. Bowman*, 99 F.2d 856, 858 (8th Cir. 1938). The language of a court's opinion "should not be extended beyond that for any purpose of authority in another or different case." *Id.* In addition, a decision depending on its underlying facts is not necessarily controlling precedent under the doctrine of stare decisis as to subsequent analysis of the same question on different facts and different records. See *Gately v. Commonwealth of Mass.*, 2 F.3d 1221, 1226 (1st Cir. 1993). "Stare decisis means that like facts will receive like treatment in a court of law." *Flowers v. United States*, 764 F.2d 759, 761 (11th Cir. 1985). The two ordinances apply to different situations, and because the underlying facts in each case are different, *Kirkeby II* does not bind us.

## IV. CONCLUSION

For the above reasons, we reverse the judgment of the district court and the award of costs and attorneys' fees. We hold that the 1985 Fargo residential picketing ordinance is constitutional, both on its face and as applied to the picketers. We remand this case to the district court to enter a judgment of dismissal of the action brought by plaintiffs against Fargo.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

**UNITED STATES DISTRICT COURT**
District of North Dakota - Southeastern Division

Chris Veneklase, Paul Mehl, Darrold Larson, Nany Emmel, and Jessica Uchtman,

Plaintiffs,

v.

City of Fargo

Defendant,

JUDGEMENT IN A CIVIL CASE

Case No.: A3-93-156

X **Jury Verdict.** Following an order for summary judgement in favor of plaintiffs on the issue of liability, this action came before the Court for a trial by jury on the issue of damages. The jury has rendered verdict.

IT IS ORDERED AND ADJUDGED pursuant to the jury verdict entered August 7, 1997, the plaintiffs are entitled to damages as follows:

| | |
|---|---|
| Chris Veneklase | $ 440.00 |
| Paul B. Mehl | $ 590.00 |
| Darrold Larson | $ 440.00 |
| Nancy Emmel | $ 960.00 |
| Jessica Uchtman | $ 1.00 |
| TOTAL JUDGEMENT | $2,431.00 |

March 31, 1998: Order Filed and Entered by Magistrate Judge Klein awarding attys' fees: $50,025.25; costs: $2,178.08 = TOTAL JUDGEMENT: $54,634.33

Date: August 26, 1997

Edward J. Klecker
Clerk

/s/
By Deputy Clerk -
Shelley M. Giaque

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

| | | |
|---|---|---|
| Chris Veneklase, Paul B. Mehl, Darold Larson, Nancy Emmel, and Jessica Uchtman, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | Civil No. A3-93-156 |
| City of Fargo, Officer David Todd, Officer Jim Schalesky, Lt. Jon Holman, and Sgt. Wayne Jorgenson of the City of Fargo Police Department | ) | |
| Defendants. | ) | |

MEMORANDUM AND ORDER

On October 8, 1993, plaintiffs Chris Veneklase, Paul B. Mehl, Darold Larson, Nancy Emmel, and Jessica Uchtman filed this civil action against defendants Officer David Todd, Officer Jim Schalesky, Lt. Jon Holman, Sgt. Wayne Jorgenson and the City of Fargo seeking redress for alleged constitutional violations arising out of an enforcement of Fargo Municipal Code § 10-0802.[1]

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1 Plaintiffs' complaint originally included four causes of action based on federal constitutional and state law theories. However, the court dismissed plaintiffs' state-law claims. (Doc. #37).

## I. FACTUAL BACKGROUND

The events that gave rise to this lawsuit were sufficiently explained in the court's previous order on the parties' cross motions for summary judgement:

> On the evening of October 10, 1991, plaintiffs participated in a public prayer vigil in the residential neighborhood of Jane Bovard, administrator of the Women's Health Organization. Plaintiffs and ten to fifteen other individuals convened in Bovard's neighborhood between the hours of 9:30 p.m. and 10:30 p.m. and began walking north and south on a public sidewalk in front of Bovard's residence and five to eight other homes. The prayer participants/demonstrators walked single file, spacing themselves several feet apart. They moved continuously, carried no signs, remained silent, and limited their activities to public streets and sidewalks on Edgewood Drive. Plaintiffs did not stop in front of Bovard's residence or any other home in the neighborhood and they did not block or impede access to or from private property.
>
> The Fargo Police Department received a complaint about residential picketing in Bovard's neighborhood and Officers Wayne Jorgenson, David Todd and Lt. Jon C.Holman responded to the call. The officers observed the prayer participants/demonstrators for approximately ten minutes before Holman approached plaintiffs and the other participants and asked them to discontinue their activities. Holman discussed the issue with Veneklase for several minutes. During their conversation, Veneklase allegedly explained that the participants were not picketing, they were simply engaging in prayer. Veneklase also claimed that he had read the Fargo antipicketing ordinance and that he did not believe that

plaintiffs' conduct fell within the scope of the ordinance. Lt. Holman allegedly indicated that he was broadly interpreting the Fargo antipicketing ordinance and that plaintiffs would be arrested if they continued their activities. Venekalse then allegedly conveyed the substance of this conversation with Holman to the other participants and a number of the people decided to leave. Plaintiffs refused to suspend their activities so defendants arrested them for picketing in a residential neighborhood.

The police officers transported plaintiffs to the Cass County Jail and held Veneklase, Mehl, Larson and Emmel overnight because they refused to pay a $50 bond. Plaintiff Uchtman, a minor at the time of her arrest, was detained for only a few hours and then released to her parents.

The City of Fargo filed charges in Cass County District Court against plaintiffs Veneklase, Mehl, Larson and Emmel for violating Fargo Municipal Code § 10-0802. The City did not file charges against Uchtman. On February 18, 1992, the Honorable Frank L. Racek dismissed the charges against plaintiffs, ruling that the picketing ordinance was constitutional on its face, but unconstitutional as applied to plaintiffs and the other individuals who participated in the prayer vigil/demonstration near the Bovard residence on October 10, 1991. Plaintiffs then filed this action seeking redress for the allegedly unconstitutional enforcement of Fargo's residential picketing ordinance.

*Veneklase v. City of Fargo*, 904 F. Supp. 1038, 1042-43 (D. N.D. Feb. 17, 1995), *rev'd* 78 F.3d 1264 (8th Cir. 1996).

II. PROCEDURAL HISTORY

In a previous order, this court ruled that defendant officers were not entitled to qualified immunity. _*Veneklase*, 904 F. Supp. At 1058. In the same order, this court also found that although the City's antipicketing ordinance was facially constitutional, the ordinance was unconstitutional as applied to plaintiffs and the City was liable for this constitutional violation because of its failure to properly train its police officers. *Id.* Finally, the court concluded that the City of Fargo's failure to properly train its police officers was the moving force behind the constitutional violations. *Id.*

On appeal, the Eighth Circuit Court of Appeals reversed the court's ruling with respect to defendant officers' qualified immunity defense, opining that "plaintiffs did not have a clearly established right...to picket"[2] and that "the arrest of plaintiffs by the defendant officers was objectively reasonable in light of the legal rules in existence at the time the action occurred." *Veneklase v. City of Fargo*, 78 F.3d 1264 (8th Cir. 1995). Therefore, the Eighth Circuit ruled that the defendant officers were entitled to qualified immunity and, accordingly, dismissed plaintiffs' claims against the defendant officers. *Id.* With respect to plaintiffs' claims against the City of Fargo, the Eighth Circuit found that "the interlocutory appeal of the City [was] not properly before" it and, therefore, refused to discuss the merits of this court's finding. *Id.* at 1270. Nevertheless, even though the Eighth Circuit did not rule on the issue of municipal liability, the Eighth Circuit advised: "We are confident, however, that the district court will now reconsider its ruling as to the City in light

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2 Even though the facts were somewhat in dispute as to whether plaintiffs' conduct constituted "picketing," this court, in its previous order, stated that "[f]or the purposes of analyzing plaintiffs' claims, the court will assume...that plaintiffs' activities on the evening of October 10, 1991, fall within the definition of "picketing" under Fargo Municipal Code § 10-0801." *Veneklase*, 904 F. Supp. at 1042 n.1.

of our resolution of the qualified immunity issue, particularly our determination that plaintiffs' arrest was objectively reasonable." *Id.* at 1269.

The City of Fargo's renewed motion for summary judgement underscores the Eighth Circuit's clear message that the appeals court did not view plaintiffs' claims against the City, based on the alleged failure to adequately train its police officers, as meritorious. The City argues that based on the Eighth Circuit's ruling, this court should now dismiss plaintiffs' remaining claims against the City, (doc. #53). For their part, plaintiffs admit that the Eighth Circuit did not favorably view their claim that the City improperly trained its police officers. (Doc. #54). However, plaintiffs argue that a more recent Eighth Circuit opinion, *Kirkeby v. Furness*, 92 F.3d 655 (8th Cir. 1996), mandates a finding of municipal liability based on the City of Fargo's facially unconstitutional antipicketing ordinance.[3]

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3 The City of Fargo argues that plaintiffs should be collaterally estopped from asserting this ground for partial summary judgement because the state district court in the prior criminal proceedings against plaintiffs, as well as this court, have previously ruled that the City of Fargo's antipicketing statute was facially constitutional. (Doc. #55). The court rules that the state district court's finding that the ordinance was facially constitutional was not necessary to the dismissal of the criminal charges against plaintiffs because Judge Racek dismissed the criminal action based on his finding that the ordinance was unconstitutional as applied. *See State v. Veneklase, et al.*, Case No. CR-91-3462-65, Feb. 18, 1992 (doc. #55, at Exh. C); *Haring v. Prosise*, 462 U.S. 306, 315 (1983) (stating that "collateral estoppel precludes the litigation of only those issues necessary to support the judgement entered in the first action."). Also, Judge Racek's analysis focused on the actual antipicketing provision without mention of the underlying definition of "picketing" that the antipicketing provision incorporated, and which the Eighth Circuit, in *Kirkeby*, ruled was facially unconstitutional. (Doc. #55, at Exh. C). Furthermore, since

## III. ADEQUACY OF CITY OF FARGO'S POLICE TRAINING

In light of the Eighth Circuit's ruling that the law regarding the parameters of the First Amendment right to protest against abortion in a residential area was not clearly established at the time of the plaintiffs' arrest, the City's failure to train its police officers could not serve as the moving force behind the violation of plaintiffs' First Amendment rights. Since the parameters of plaintiffs' First Amendment rights were still in question, any training of the City's police officers would necessarily leave those parameters in doubt. Consequently, the lack of training by the City cannot be the moving force behind the violation of plaintiffs' constitutional rights.

## IV. FACIAL VALIDITY OF CITY'S ANTIPICKETING ORDINANCE

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the criminal charges against plaintiffs were dismissed on an issue different from the ordinance's facial constitutionality, the plaintiffs could not appeal the state court's dicta that he ordinance was facially constitutional. *See Mandich v. Watters*, 970 F.2d 462, 465 (8th Cir. 1992) (stating, "A full and fair opportunity to litigate includes the right to appeal an adverse decision."). Similarly, with regard to this court's earlier ruling that the ordinance was facially constitutional, plaintiffs were not able to appeal that order since the police officers obtained an interlocutory appeal from the Eighth Circuit on the issue of qualified immunity. Therefore, this court's order does not constitute a final disposition on the merits and does not foreclose plaintiffs' present motion asking this court to reconsider its finding.

Alternatively, the City also argues that plaintiffs failed to allege that the ordinance was facially unconstitutional in their complaint. After reviewing plaintiffs' complaint, the court finds that plaintiffs adequately pled this issue in their complaint, and in addition raised the issue as a ground in their initial motion for partial summary judgement.

Plaintiffs have presented, as an alternative ground for partial summary judgement on municipal liability, a renewal of their argument that the antipicketing ordinance is facially unconstitutional. In *Kirkeby v. Furness*, 92 F.3d 655 (8th Cir. 1996), the Eighth Circuit ruled that the 1993 version of the City of Fargo's antipicketing ordinance had numerous constitutional infirmities. Most relevant to the present case, the *Kirkeby* court found that the antipicketing ordinance incorporated a definition of "picketing" that was unconstitutional.[4] *Id.* at 658-59. In the 1993 ordinance, the City of Fargo defined "picketing" as "standing, marching, sitting, lying, patrolling or otherwise maintaining a physical presence inside of, in front, or about any premises for the purpose of persuading the public or an occupant of such premises or to protest some action, attitude or belief." Fargo Municipal code, art. 10-0801(2). In *Kirkeby*, the Eighth Circuit first made the threshold determination that the City's definition of "picketing" was content-specific. *Kirkeby*, 92 F.3d at 659. The Eighth Circuit reasoned, "It is impossible to tell whether a stander, marcher, patroller, etc. is 'picketing' without analyzing whether he or she intends to convey a 'persuasive' message or to 'protest some action, attitude or belief.'" *Id.*

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4 The Eighth Circuit, in Kirkeby, also ruled that the definition of "picketing" was unconstitutionally vague, opining: "In this case, it is unclear to us, and we think to the ordinary person, precisely what activities are considered picketing." Kirkeby, 92 F.3d at 659. In addition, the Eighth Circuit found that the antipicketing ordinance failed to "'establish minimal guidelines to govern law enforcement.'" Id. (quoting Kolender v. Lawson, 461 U.S. 352, 358 (1983) (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)). Furthermore, the Eighth Circuit concluded that the City's "total ban" on "targeted residential picketing" was unconstitutional. Id. Finally, the Eighth Circuit also found unconstitutional the scope of the no-picketing zones that the City established and the authority given to the Board of City Commissioners to regulate picketing in established picketing zones. Id. at 660-61.

Because the Eighth Circuit found the City's definition of "picketing" to be content-specific, the Eighth Circuit declared that the City's antipicketing ordinance, which incorporated the "picketing" definition, must satisfy strict scrutiny; that is, the ordinance must be narrowly tailored to serve a compelling government interest. *Id.* The Eighth Circuit, in *Kirkeby*, ultimately concluded that the City of Fargo's antipicketing ordinance was unconstitutional because the City's proffered interest, protecting residential privacy and tranquility, was not a compelling interest. Id. at 659 (citing *Carey v. Brown*, 447 U.S. 455, 465, 100 S. Ct. 2286, 2292-93, 65 L. Ed.2d 263 (1980)).[5] And, the Eighth Circuit emphasized, "[b]ecause the entire ordinance is bottomed on this definition [of "picketing"], it is unconstitutional." *Id.*

The City's 1993 antipicketing ordinance (along with its definition of "picketing", which the Eighth Circuit found unconstitutional in *Kirkeby*,) is not identical to the City of Fargo's 1985 antipicketing ordinance, which is at issue in the present case. The City argues the 1985 ordinance, in the present case, "bears little similarity" to the 1993 ordinance that the Eighth Circuit found unconstitutional, "except with respect to the definition of 'picketing' which is similar, but not identical..." (Doc. #55, at 1). The City explains that "the 1993 ordinance [was] more expansive and include[d] 'standing, marching, sitting, lying, patrolling, or otherwise maintaining a physical presence.'" In contrast, the City asserts, "in the 1985 ordinance, picketing includes only 'the practice of standing, marching, or patrolling....'" *Id.*

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5 Alternatively, the Eighth Circuit, in *Kirkeby*, stated that even if the ordinance was content-neutral, the ordinance would still fail strict scrutiny and be unconstitutional because the restrictions were not narrowly tailored. *Kirkeby*, 92 F.3d at 659.

While the court notes some differences between the City's 1985 antipicketing ordinance in the present case and the 1993 version that the Eighth Circuit found unconstitutional in *Kirkeby*, the court finds that the City's 1985 antipicketing ordinance employs a definition of "picketing" which contains the same unconstitutional terms. The City's argument that the 1985 definition is constitutional because it did not include "sitting, lying,...or otherwise maintaining a physical presence" addresses only the Eighth Circuit's criticisms that the 1993 definition of "picketing" was unconstitutionally vague and not narrowly tailored. However, the "vagueness" and "tailoring" infirmities were not the only, or even primary, basis the Eighth Circuit cited in finding the definition unconstitutional. The Eighth Circuit's principal holding in *Kirkeby* was that the 1993 definition of "picketing" was content-specific and that the definition failed strict scrutiny. The critical portions of the City's 1993 definition of "picketing" that the Eighth Circuit found problematic were the phrases "for the purpose of persuading" and "to protest some action, attitude or belief...." *Kirkeby*, 92 F.3d at 659. This language is identical to the phrases used in the 1985 definition of "picketing" at issue in the present case. Specifically, the 1985 ordinance defines "picketing" as "the practice of standing, marching, or patrolling by one or more persons inside of, in front, or about any premises for the purpose of persuading an occupant of such premises or to protest some action, attitude, or belief...." Fargo Municipal Code § 10-0801 (amended Feb. 1, 1993) (emphasis added).

In this court's previous ruling regarding the City's liability, this court found that the City's definition of "picketing" was content-neutral, opining that the City of Fargo's "purposes for promulgation of the ordinance are unrelated to the content of the expression it seeks to regulate...." *Veneklase*, 904 F. Supp. at 1046. Although this court has not necessarily changed its view of the content neutrality of the City's 1985 definition of

"picketing," the court cannot ignore the clear, controlling holding in *Kirkeby*. In this court's view, the recent *Kirkeby* decision forecloses any conclusion other than that the City's 1985 definition of "picketing" was content-specific. Therefore, the court concludes that the definition of "picketing" in the City's 1985 antipicketing ordinance was content-specific. Consequently, the proper test to apply in evaluating the constitutional validity of the picketing ban is whether it is narrowly tailored to serve a compelling governmental purpose. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Based on the Eighth Circuit's ruling in *Kirkeby*, the court finds that the City's antipicketing ordinance was not narrowly tailored to effectuate a compelling governmental interest. Therefore, this court reiterates the Eighth Circuit's *Kirkeby* determination and concludes that the City of Fargo's 1985 antipicketing ordinance, Fargo Municipal Code § 10-0802, is "bottomed" on an unconstitutional definition of "picketing" and does not satisfy strict scrutiny. *See Kirkeby*, 92 F.3d at 659. Accordingly, the court rules that the City's 1985 antipicketing ordinance is facially unconstitutional.

In *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978), the United States Supreme Court ruled that a municipal government is a "person" subject to § 1983 liability when the municipality "implements or executes a[n]...ordinance" that is the moving force of the alleged constitutional violations. *Id.* at 690. In the present case, the City's facially unconstitutional antipicketing ordinance was unquestionably the "moving force" behind the police officers' arrest of plaintiffs for their picketing activities. Accordingly, the court grants the plaintiffs' motion for partial summary judgement and finds that the City of Fargo is liable for the plaintiffs' alleged constitutional damages.

IT IS SO ORDERED that:

1. Plaintiffs' motion for partial summary judgement (doc. #53) is granted on the issue of the City of Fargo's liability. A trial on the issue of damages will be held on a date to be determined.

2. Defendant City of Fargo's motion for summary judgement (doc. #50) is denied.

Dated this 10th day of April, 1997.

/s/
Karen K. Klein
United States Magistrate Judge

K1

OFFICE OF THE CITY ATTORNEY
FARGO, NORTH DAKOTA

ORDINANCE NO. 2190

NOTE: This ordinance was subsequently recodified as Article 10-08 by Ordinance No. 2508 (Dec. 1989).

Section 1. Enactment.

Notwithstanding any contrary provisions of the statutes of the State of North Dakota, Article 10-12 of Chapter 10 of the Revised Ordinances of 1965 of the City of Fargo is hereby enacted to read as follows:

ARTICLE 10-12

PICKETING

10-1201. Definitions.–For purposes of this article, certain words and phrases used herein are defined as follows:

A. "Dwelling" means any structure or building, or dwelling unit within a building, which is used as a place of residence.
B. "Picketing" means the practice of standing, marching or patrolling by one or more persons inside of, in front, or about any premises for the purpose of persuading an occupant of such premises or to protest some action, attitude or belief.

10-1202. Picketing of dwellings prohibited.–No person shall engage in picketing the dwelling of any individual in the

City of Fargo.

Section 2. Penalty.

Every person, firm or corporation violating this section shall, upon conviction thereof, be punished by a fine not to exceed $500 or by imprisonment not to exceed 30 days, or by both such fine and imprisonment, in the discretion of the Court; the Court to have power to suspend said sentence and to revoke the suspension thereof.

Section 3. Effective Date.

This ordinance shall be in full force and effect from and after its passage, approval and publication.

/s/
Jon G. Lindgren, President of the Board of City Commissioners of the City of Fargo

(SEAL)

Attest:

/s/
F. R. Fahrlander, City Auditor

First Reading: Jan. 21, 1985
Second Reading: Jan. 28, 1985
Final Passage: Jan. 28, 1985

L1

# AFFIDAVIT OF CHRISTOPHER MARTIN VENEKLASE

STATE OF OHIO )
)ss
COUNTY OF HAMILTON )

Now comes Affiant, Christopher Martin Veneklase, and being first duly sworn and cautioned states the following based upon his personal knowledge and belief:

1. I am a Plaintiff in a case now pending in the United States District Court for the District of North Dakota which is captioned Chris Veneklase, et al. V. City of Fargo, et al., Case No. A3-93-156. I am providing this Affidavit in support of a Motion for Summary Judgement which is being filed on my behalf. All of the following statements relate to my arrest in the City of Fargo ("Fargo") on October 10, 1991, and the events which immediately proceeded and followed it.

2. On October 10, 1991, I had attended an evening of praise and worship at the Community Praise Center in Moorhead, Minnesota. In the course of the event, I listened to a Pro-Life speaker and realized that Pro-Lifers should pray against the evils of abortion publicly in the streets, in addition to our private worship. Consequently, I invited others at the Community Praise Center to join me in silent prayer along the residential block of Edgewood Avenue in Fargo. I knew at the time that abortion provider Jane Bovard ("Bovard") was a resident of that street, but I did not know which house was her residence until I arrived there.

3. In response to my suggestion of public prayer in Bovard's neighborhood, someone asked me if we would be arrested. I responded that we should not be arrested because we would not be breaking any laws. I had previously read Fargo's Residential

Picketing Ordinance (hereinafter "the Ordinance") in effect at the time. I also had a basic understanding of a residential picketing case decided by the U.S. Supreme Court called Frisby v. Schultz, which I understood to permit peaceful picketing in residential neighborhoods so long as no individual residence was targeted. My goal, and my specific suggestion to the others, was to go as a prayer presence, without targeting Bovard's or anyone else's residence, to silently wage "spiritual warfare" against the evils of abortion. We were not going to picket or carry any signs or shout any prayers or slogans of any kind.

4. Approximately 18 individuals, both adults and juveniles, joined me in prayer along the north side of Edgewood Avenue at 9:30 or 10:00 p.m. We walked in single file along the public sidewalk, covering six to eight residential lots. Approximately 15 minutes after our arrival, I was startled by a car which honked its horn and nearly struck me as it pulled into the driveway at Bovard's residence. Bovard was the driver of the car, and in spite of her aggressive and threatening conduct, no one in our prayer group said a word to her. Rather, we all continued walking in silent prayer up and down the public sidewalks on Edgewood Avenue.

5. Approximately ten minutes later, two Fargo police cars arrived and observed us for five to ten minutes. Four other police cars arrived shortly thereafter, including at least one canine unit and a police van. Finally, a police officer later identified as Lt. Jon Holman approached us and blocked our path on the public sidewalk as we were heading southwest near Bovard's property. Lt. Holman told us that he had observed us walking back and forth along the block and that we were in violation of the Ordinance. He indicated that we would be arrested if we did not disperse.

6. At that point, I entered into a conversation with Lt. Holman. I indicated that I was familiar with the Ordinance, that I had read it, and that we were not in violation of the Ordinance because we

were not even picketing. I emphasized that we were only praying silently and that we had a constitutional right to do so. Lt. Holman said that he knew why we were there, that we were target picketing, that he was going to broadly interpret the Ordinance to conclude that we were in violation of it, and that we would be arrested if we did not disperse. I discussed the issue with Lt. Holman for a good 15 minutes. Lt. Holman had been joined at one point by Officer David Todd and a female officer.

7. During the course of our conversation, Lt. Holman informed me that the Fargo Police had received complaints from residents in the area who claimed to be bothered by our presence. Lt. Holman said that our presence made the neighbors anxious or nervous. I asked Lt. Holman if that would entitle me to have anyone arrested who walked repeatedly in front of my home and made me nervous, and he answered "but that would be a different situation". I asked why it was different, but he would not respond, saying only that if we did not leave, he would arrest us and let the courts decide the issue. I told Officer Todd and the female officer that I wanted them as witnesses in court. The officers indicated that they would take note of those facts.

8. As an alternative theory to arrest us, Lt. Holman then told me that he was giving us a direct order to leave, and that if we did not we would be arrested for disobeying a police order. I felt this was an improper threat of force, but I realized at that point that Lt. Holman's threat was real and that our arrest was imminent. Therefore, I turned to the others and explained that we would be arrested if we stayed and prayed, even though we were doing nothing wrong. I also explained to the others that I was not going to stop praying just because someone did not want me to pray, and that anyone else was welcome to stay with me or they could leave the area and go home. Approximately three adults and three juveniles stayed with me. I then explicitly made the point to Officer

Todd and the female officer who had joined Lt. Holman that no one was carrying a sign, no one had been praying in a loud voice, and everyone had simply been walking up and down the public sidewalks in front of several houses.

9. I then told Lt. Holman that I intended to continue walking and praying. I did not believe he could order me to leave unless I did something wrong, which I had not. Lt. Holman stepped aside, but after I had walked past him about 10 feet, I was arrested, handcuffed, photographed, and taken to the Cass County Jail. I was incarcerated for the entire night, and subsequently prosecuted by the City of Fargo under Cass County Case No. CR-91-3462 for an alleged violation of the Ordinance. All charges were dismissed on constitutional grounds by Cass County Judge Frank L. Racek on February 18, 1992, which dismissal constituted the final disposition of those charges.

10. Neither I nor anyone else in our group, to my knowledge, intended to target Bovard's residence that night, nor did anyone's conduct give any emphasis to the Board residence or to any other residence. The only incident which drew any attention to Bovard's residence was her own reckless driving as she arrived home, which endangered me. We did not wish to cause a disturbance or even to attract attention, but we wanted only to pray against the evils of abortion in the neighborhood of a woman who was intimately tied to the abortion industry in Fargo.

11. At all times during this incident, Lt. Holman, Officer Todd and the other arresting officers showed no indication whatsoever that they were interested in protecting our rights. Rather, they acted in a way to make clear that their purpose was to intimidate us into leaving the neighborhood, or to arrest us. Prior to arresting us, Lt. Holman, Officer Todd, and the other arresting officers offered us no options and no alternatives on how we could remain "legally" in the neighborhood to pray. The entire episode shocked me into

realizing what life must have been like in the Soviet Union under the stranglehold of atheistic communism.

Further Affiant Sayeth Naught

/s/
Christopher Martin Veneklase

Sworn to by and subscribed before me on this 4th day of September, 1994.

/s/
Notary Public
Thomas W. Condit, Attorney at Law
NOTARY PUBLIC - STATE OF OHIO - My commission has no expiration date. Section 147.03 R.C.

M1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
(SOUTHEASTERN DIVISION)

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|---|---|
| Chris Veneklase, et al.,<br>Plaintiffs,<br>v.<br><br>City of Fargo, et al.,<br>Defendants. | Civil No. A3-93-156<br><br>(MAGISTRATE JUDGE KLEIN)<br><br>DEFENDANTS' RESPONSE TO PLAINTIFFS' FIRST SET OF REQUEST FOR ADMISSIONS |

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The Defendants, by and through their attorney, hereby respond to Plaintiffs' Request for Admissions.

****

[Responses to Request Nos. 1-18 omitted]

19. Todd, Schalesky, Holman and Jorgenson acted pursuant to the City's official policies, customs, practices and procedures when they arrested Plaintiffs for their activities.

**RESPONSE** - It is admitted that the arresting officer or officers did act pursuant to the City's official policies, customs, practices, and procedures when the Plaintiffs were arrested.

20. Todd, Schalesky, Holman and Jorgenson acted pursuant to their training and instructions as City of Fargo police officers when they arrested Plaintiffs for their activities on October 10, 1991.

**RESPONSE** - It is admitted that the arresting officer or officers did act pursuant to his training and instructions as a City of Fargo police officer when the Plaintiffs were arrested.

Dated this 31st day of March, 1994.

/s/
Ronald Raftevold
Chief of Police
Fargo Police Department
City of Fargo

N1

UNITED STATES DISTRICT COURT
for the District of North Dakota
Southeastern Division

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Chris Veneklase, et al.,

Plaintiffs, FILE NO. A3-93-156

v. AFFIDAVIT OF WAYNE O. SOLBERG

City of Fargo, et al.,

Defendants.

---

STATE OF NORTH DAKOTA )
: ss
COUNTY OF CASS )

COMES NOW Wayne O. Solberg, being first duly sworn on oath, deposes and states as follows:

1. I have been legal counsel for the City of Fargo for approximately 29 years. I was an Assistant City Attorney from 1968 to 1970, City Attorney from 1970 until 1994, and Special Assistant City Attorney from 1994 until April of 1997.
2. My duties as legal counsel for the City included, among other things, advising the Board of City Commissioners and the various departments of the City on all legal matters, drafting ordinances, and defending and prosecuting legal actions on behalf of the City of Fargo. In connection with

these duties, I regularly attended virtually all of the regular meetings of the Board of City Commissioners.

3. The City of Fargo did not have a residential picketing ordinance until 1985. The adoption of the ordinance at that time was an outgrowth of actual and anticipated residential picketing of individuals employed at the Women's Health Organization, a local abortion provider which had been established in the mid-1980's.
4. There was considerable public debate on the ordinance and needless to say, deep division of opinion on the issue of abortion. However, it was my impression that the consensus was that protests of that nature were not appropriate in residential areas.
5. As a result of the public debate, a first residential picketing ordinance was passed on January 28, 1985, as ordinance number 2190 which was codified as Article 10-12 of the Fargo Municipal Code. A copy of that ordinance is attached hereto and made a part hereof. In 1988, the United States Supreme Court, in *Frisby v. Schultz*, 487 U.S. 474 (1988) upheld the Brookfield, Wisconsin residential picketing ordinance, which was very similar to the ordinance which had been adopted in Fargo in 1985. However, the Court upheld the ordinance only as it applied to "focused" picketing which was aimed at particular residents, as opposed to general residential picketing.
6. Although *Frisby* upheld a City's right to prohibit "focused" residential picketing, the Brookfield ordinance and the Fargo ordinance provided very little guidance as to what constitutes "focused" picketing.
7. In 1991, a number of individuals engaged in residential picketing in areas of the City. In these separate incidents, individuals were arrested and charged with violation of the

Fargo residential picketing ordinance. Two of the three cases were dismissed before trial by Cass County Court, the Honorable Frank Racek presiding. In the opinion dismissing the cases, the Court held that the Fargo residential picketing ordinance was constitutional on its face, but was unconstitutional as applied to the Defendant's in those particular cases. This decision was rendered in February of 1992. The third case was also subsequently dismissed after the City presented its evidence at trial because the Defendant did not fit within the definition of picketing as contained in the ordinance in that the Defendant was "kneeling" in front of the residence of the target of the picketing and not "standing, marching, or patrolling".

8. As a result of these enforcement problems, attempts were made to amend the ordinance to define with particularity, the type of activities which would be prohibited and also to create a means to establish restricted picketing areas in places where the picketing activities were numerous and intense. The amended ordinance was adopted in February of 1993 as ordinance number 2640. A copy of that ordinance is attached hereto and made a part hereof.
9. The 1993 residential picketing ordinance was challenged in *Kathleen Kirkeby, et al., v. Bruce Furness, Mayor of the City of Fargo, et al.* The District Court upheld the constitutionality of that portion of the 1993 ordinance relating to targeted picketing (the portion of the 1993 ordinance that was similar to the 1985 ordinance which is the subject of this case) but reserved ruling on the section of the 1993 ordinance related to restricted residential picketing zones.
10. On appeal to the Eighth Circuit Court of Appeals from the

District Court decision in *Kirkeby*, the Court of Appeals reversed the District Court and concluded that the 1993 ordinance, including the targeted picketing section of the ordinance was unconstitutional on its face. *Kirkeby v. Furness*, 92 F3d. 655 (8th Cir. 1996). In so doing, the appellate court commented on issues which had not been raised by the parties and therefore, should be considered as dictum. It is these comments that this Court has relied upon to conclude that the prior ordinance which was adopted in 1985, was also unconstitutional.

****

FURTHER YOUR AFFIANT SAYETH NAUGHT

DATED this 18th day of September, 1997.

/s/
Wayne O. Solberg

STATE OF NORTH DAKOTA )
: ss
COUNTY OF CASS )

UNITED STATES CONSTITUTION AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

42 USCS § 1983 (2001)

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 USCS § 455 (2001)

§ 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might

reasonably be questioned.

RULE 36, FEDERAL RULES OF CIVIL PROCEDURE
Requests for Admission

(a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(d).

****

(Section omitted)

(b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provision of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

SFN 16751 (6-89)

Page ____ of ____

| Agency | ORI | Incident/Case No. | Incident Date |
|---|---|---|---|
| FARGO POLICE | ND | 91-9403 | 10,10,91 |

Narrative

AT ABOUT 2229 HRS, THURSDAY, 10/10/91, OFFICERS DAVID TODD #204 AND JIM SCHALESKY #205, WERE DISPATCHED TO 2820 EDGEWOOD DR, CONCERNING A REPORT OF PROTESTERS WALKING IN THE AREA. I RECOGNIZED THE ADDRESS OF 2820 EDGEWOOD DRIVE TO BE THE RESIDENCE OF JANE BOYARD, ADMINISTRATOR OF THE WOMEN'S HEALTH ORGANIZATION CLINIC. SGT. JORGENSON AND I RESPONDED TO THE AREA.

AS I NEARED THE AREA I HEARD OFFICER TODD RADIO HQ THAT HE WAS IN THE AREA AND HE COULD SEE SEVERAL PEOPLE WALKING NORTH ON THE SIDEWALK AWAY FROM 2820 EDGEWOOD DR. AT ABOUT THIS TIME I ARRIVED AT THE INTERSECTION OF 29TH AVE N & EDGEWOOD DR. I TURNED RIGHT AND HEADED SOUTH ON EDGEWOOD DR. AFTER TURNING I CAME UPON 4 VEHICLES PARKED JUST SOUTH OF 29TH AVE N ON EDGEWOOD DR. THE FIRST VEHICLE WAS A VAN WITH A LICENSE PLATE "BLES2D". THE VAN HAD A POSTER IN THE REAR WINDOW THAT WAS ABOUT 3'x4' THAT SAID "ABORTION KILLS BABIES" (QUOTATION NOT EXACT). THE NEXT CAR (2) WAS AN OLDSMOBILE W/ LICENSE CJC 752. THE NEXT CAR (3) WAS AN OLDSMOBILE STATION WAGON W/ LICENSE RHS 868. THE FOURTH CAR WAS CHRYSLER W/ LICENSE CJD 292. ONE OF THE LAST 3 CARS HAD A BUMPER STICKER ON THE REAR THAT SAID "ABORTION STOPS A BEATING HEART" (QUOTATION NOT EXACT). I ALSO RECOGNIZED A FULL SIZE WHITE VAN PARKED ON THE EAST SIDE OF THE STREET AND RAN A REGISTRATION CHECK ON THE VAN'S LICENSE, ND/BIH089. THE REGISTRATION WAS TO THE HELP AND CARING MINISTRY INC., FARGO. I ASSUMED THAT ALL THESE CARS BELONGED TO THE PERSONS WALKING IN FRONT OF THE BOYARD RESIDENCE.

AFTER I DROVE BY THE VEHICLES, I HEARD OFFICER TODD RADIO THAT THE PROTESTORS HAD TURNED AROUND AND WERE WALKING SOUTH ON THE SIDEWALK AGAIN. I THEN DROVE UP AND PARKED JUST NORTH OF 2820 EDGEWOOD. I GOT OUT OF MY SQUAD CAR AND COULD SEE 15 OR 16 PEOPLE WALKING SLOWLY SOUTH ON THE SIDEWALK SOUTH OF 2820 EDGEWOOD. I WALKED UP IN FRONT OF 2820 EDGEWOOD AND STOOD ON THE SIDEWALK WITH OFFICERS TODD AND SCHALESKY. THE PROTESTERS WALKED SOUTH ABOUT 3 HOUSES SOUTH OF 2820 EDGEWOOD AND THEN STOPPED, TURNED AROUND AND WALKED NORTH ON THE SIDEWALK IN SINGLE FILE, ABOUT 3-6 FEET APART. THE PROTESTORS WALKED BY ME AND CONTINUED NORTH. IT APPEARED THEY

Use additional sheets if necessary

| Officer | Officer No. | Report Date | Supervisor |
|---|---|---|---|
| X J C Holum | 48 | 10,10,91 | X |

SFN 16731 (6-89)

Page ____ of ____

| Agency | ON | IN or Case No. | Incident Date |
|---|---|---|---|
| FARGO | ND | 91-9403 | 10/10/91 |

Narrative

WORE PRAYING / MEDITATING. SOME OTHER PROTESTORS WERE WALKING WITH THEIR HANDS FOLDED AND SOME WERE CARRYING ROSARY BEADS. THE PROTESTORS CONTINUED BY ME AND I RECOGNIZED 3 OF THE PROTESTORS AS PEOPLE THAT HAVE FREQUENTLY PROTESTED AT THE W.H.O. CLINIC. I RECOGNIZED DAROLD AND PAT LARSON AND CHRIS VENEKLASE. THE PROTESTORS WALKED ABOUT 2 HOUSES NORTH OF 2820 EDGEWOOD, STOPPED, MINGLED AROUND FOR A FEW SECONDS AND THEN TURNED AROUND AND WALKED BACK SOUTH TOWARD ME. WHEN THE PROTESTORS APPROACHED THE PROPERTY OF 2820 EDGEWOOD I STOPPED THEM AT THE SOUTH EDGE OF THE NEIGHBORING DRIVEWAY. I INFORMED THE FIRST GIRL & THE FIRST MAN (CHRIS VENEKLASE) THAT THEY HAD TO STOP AND THEY DID. THE REST OF THE GROUP SLOWLY REACHED ME AND STOPPED ALSO. I SPOKE INITIALLY WITH VENEKLASE AND INFORMED HIM THAT HE AND THE REST OF THE GROUP WERE VIOLATING THE CITY'S ORDINANCE ABOUT PICKETING IN A RESIDENTIAL NEIGHBORHOOD. VENEKLASE BEGAN TO DISCUSS THIS WITH ME, ARGUING THAT HE AND HIS GROUP WERE JUST WALKING THROUGH THE NEIGHBORHOOD. IT APPEARED VENEKLASE AND DAROLD LARSON WERE ACTING AS SPOKESMEN FOR THE GROUP. I ASKED VENEKLASE AND THE GROUP TO LEAVE THE AREA, TO WHICH THEY RESPONDED THEY COULD NOT. I THEN WARNED THE GROUP THAT IF ANYONE CONTINUED TO PICKET / PROTEST WALK ON EDGEWOOD, THEY WOULD BE ARRESTED FOR VIOLATING THE PICKETING ORDINANCE. I SPECIFICALLY ASKED VENEKLASE IF HE UNDERSTOOD WHAT I HAD SAID & HE RESPONDED THAT HE UNDERSTOOD. VENEKLASE ALSO REPEATED MY WARNING AND REQUEST TO THE REST OF THE GROUP. THE ENTIRE GROUP BACKED UP TO THE NORTH & TALKED. AFTER ABOUT 5 MINUTES THE GROUP SEPERATED INTO 2 GROUPS, ONE WALKING AWAY TO THE NORTH TOWARDS THE CARS PARKED IN THE STREET. THE SECOND GROUP WALKED BACK TO WHERE I WAS STANDING. VENEKLASE WAVED THE SECOND GROUP FORWARD AND SAID THAT NONE OF THE OTHERS COULD NOT LEAVE THE AREA, AND WOULD CONTINUE TO WALK & PRAY IN THE NEIGHBORHOOD. I AGAIN WARNED THIS GROUP THEY WOULD BE ARRESTED IF THEY CONTINUED. VENEKLASE ASKED ME IF OFFICERS TODD, SCHAEFSKY, SGT. JOHNSON AND MYSELF WERE A STRIKE LINE. I REPLIED THAT WE WERE NOT. VENEKLASE, DAROLD LARSON AND 5 OTHER PROTESTORS WALKED PAST ME, SOUTH ON THE SIDEWALK.

Use additional sheets if necessary

| Officer | Officer No. | Report Date | Supervisor |
|---|---|---|---|
| X Jon C Holmen | 48 | 10,10,91 | X |

SFN 16731 (6-89) Page ____ of ____

| Agency | ORI | Title of Case | Case No. | Incident Date |
|---|---|---|---|---|
| FARGO POLICE | ND | | 91-9403 | 10,10,91 |

Narrative

I INFORMED VENEKLASE HE WAS UNDER ARREST & THEN INFORMED THE OTHERS THE SAME. VENEKLASE AND THE OTHERS STOPPED & CALMLY SUBMITTED TO BEING HANDCUFFED. OFFICER LEMKE BOOKED THE BAILIFF'S KAH AND TRANSPORTED 4 ADULTS TO THE CASS CO. JAIL. OFFICER TODD TRANSPORTED 3 JUVENILES TO THE STATION. ALL 7 WERE CHARGED WITH VIOLATION OF #10-0802 & #8-0111, PICKETING UNLAWFULLY & FAILURE TO OBEY A LAWFUL ORDER.

THE 4 ADULTS WERE IDENTIFIED AT THE JAIL AS:

1. CHRIS VENEKLASE, DOB/ 5-7-60.
2. PAUL MOHL, DOB/ 9-22-61.
3. DAROLD LARSON, DOB/ 6-26-42.
4. NANCY EMMER, DOB/ 10-22-52.

THE 3 JUVENILES WERE IDENTIFIED AS:

1. JESSICA UCHTMAN, DOB/ 7-16-75.
2. JEREMY UCHTMAN, DOB/ 12-30-76.
3. JOSHUA UCHTMAN, DOB/ 10-19-78.

THE JUVENILES WERE REFERRED TO JUVENILE COURT AND RELEASED TO THEIR MOTHER, CHARLENE UCHTMAN.

AFTER THE PROTESTERS WERE TRANSPORTED AWAY FROM THE AREA, LT. SANDERSON AND I INTERVIEWED JANE BOVARD AT HER RESIDENCE. BOVARD SAID HER HUSBAND, RICHARD, ARRIVED HOME AT ABOUT 2215 HRS, AND SAW THE PROTESTERS WALKING BACK & FORTH ON THE SIDEWALK IN FRONT OF THEIR HOME. BOVARD SAID SHE ARRIVED HOME A WHILE LATER AT 2230 HRS. BOVARD SAID SHE ALSO SAW THE PROTESTERS WALKING IN FRONT OF THEIR HOME. BOVARD SAID WHEN SHE GOT IN THE HOUSE SHE WENT BACK TO A DARKENED BEDROOM & WATCHED THE PROTESTERS OUTSIDE. BOVARD SAID THE PROTESTERS WALKED BACK & FORTH FROM THE EDGE OF THE SOUTH (2116) NEIGHBOR'S LAWN TO THE EDGE OF THE NORTH NEIGHBOR'S (2124) DRIVEWAY. BOVARD SAID SHE SAW THE PROTESTERS MAKE ABOUT 4-5 ROUND TRIPS IN FRONT OF HER HOME. BOVARD SAID SHE CALLED THE POLICE RIGHT AWAY WHEN SHE ARRIVED HOME. BOVARD SAID SHE IS VERY CONCERNED ABOUT THIS ACTIVITY IN HER NEIGHBORHOOD FOR HER OWN AND HER NEIGHBOR'S SAFETY.

Use additional sheet(s) if necessary

| Officer | Officer No. | Report Date | Supervisor |
|---|---|---|---|
| X J C Holman | 48 | 10,10,91 | X |

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SFN 16731 (6-89)



| Agency FARGO P.D | ORI ND | 1st...r or Case No. 91-009403 | Incident Date 10/10/91 |
|---|---|---|---|

Narrative

ON 10/10/91 AT 2229 HOURS OFFICER SCHALESKY AND MYSELF WERE DISPATCHED TO 2820 EDGEWOOD DR. ON A COMPLAINT OF PROTESTER WALKING IN FRONT OF THAT RESIDENCE. WHEN I ARRIVED IN THE AREA I SAW A GROUP OF PEOPLE APPROXIMATELY 15-20 IN SIZE. THE GROUP OF PEOPLE WERE WALKING NORTH IN A LINE ON THE SIDEWALK. WHEN I WAS ARRIVING INTO THE AREA THE LINE OF PEOPLE WERE JUST WALKING PAST THE RESIDENCE AT 2820 EDGEWOOD DR. AND CONTINUED WALKING NORTH ON THE SIDEWALK UNTIL THEY WERE APPROXIMATELY 3 HOUSES AWAY THE GROUP OF PEOPLE THEN TURNED AROUND AND WALKED SOUTH PAST THE RESIDENCE AT 2820 EDGEWOOD DR. AND CONTINUED SOUTH UNTIL THEY WERE TWO HOUSES PAST 2820 EDGEWOOD DR.. THE GROUP OF PEOPLE THEN TURNED AROUND AND WALKED NORTH PAST THE RESIDENCE AT 2820 EDGEWOOD DR. AGAIN AND CONTINUED UNTIL THEY WERE APPROXIMATELY 2-3 HOUSES NORTH OF THAT RESIDENCE. THE GROUP OF PEOPLE THEN TURNED AROUND AGAIN AND WALKED SOUTH TOWARDS THE RESIDENCE AT 2820 EDGEWOOD DR. AGAIN. AT THIS POINT LT. HOLMAN, OFFICER SCHALESKY AND MYSELF STOPPED THE GROUP OF PEOPLE ON THE SIDEWALK. LT. HOLMAN INFORMED THE GROUP OF PEOPLE THAT THEIR ACTIONS WERE IN VIOLATION OF THE CITY PICKETING ORDINANCE AND THAT THEY WERE DISRUPTING THE NEIGHBORHOOD. LT. HOLMAN TOLD THE GROUP OF PEOPLE THAT THEY COULD NOT CONTINUE WITH THIS ACTIVITY AND THAT IF THEY DID SO THEY WOULD BE ARRESTED AND CHARGED WITH FAILURE TO OBEY A LAWFUL ORDER OF A POLICE OFFICER AND VIOLATING THE CITY PICKETING ORDINANCE. LT. HOLMAN ASKED THE PEOPLE IF THEY UNDERSTOOD THIS. CHRISTOPHER VENEKLASE AND PAUL MEHL SAID "YES I UNDERSTAND WHAT YOU ARE SAYING." VENEKLASE (WHO WAS ACTING AS THE SPOKESMAN FOR THE GROUP) TURNED TO THE GROUP AND EXPLAINED WHAT LT. HOLMAN HAD ALREADY EXPLAINED TO THEM, AND TOLD THE PEOPLE THAT "THOSE OF YOU WHO DON'T WANT TO BE ARRESTED SHOULD PROBABLY LEAVE NOW. THE PEOPLE GROUPED TOGETHER AND TALKED AMONGST THEMSELVES. THEN SEVEN PEOPLE CAME OUT OF THE GROUP AND WALKED PAST LT. HOLMAN, OFFICER SCHALESKY,

Use additional sheets if necessary

| Officer X DAVID TODD | Officer No. 126 | Report Date 10/10/91 | Supervisor X |
|---|---|---|---|

SFN 16751 (6-89)

Page 2 of ____

| Agency | ORI | ISE/ITN or Case No. | Incident Date |
|---|---|---|---|
| FARGO P.D | ND | 91-009403 | 10,10,91 |

Narrative

AND MYSELF IN VIOLATION OF LT. HOLMAN'S ORDER. OF THE SEVEN PEOPLE FOUR WERE ADULTS AND THREE WERE JUVENILES. ALL SEVEN PEOPLE WERE ARRESTED AND HANDCUFFED. I TRANSPORTED THE THREE JUVENILES TO THE POLICE STATION WHERE THEY WERE REFERRED TO JUVENILE COURT AND THEN RELEASED TO THEIR MOTHER. THE JUVENILES WERE: JESSICA UCHTMAN, JEREMY UCHTMAN, AND JOSHUA UCHTMAN. THE ADULTS WERE TRANSPORTED TO THE COUNTY JAIL BY OTHER OFFICERS.

DAVID TODD [illegible]

Mike Miller

Use additional sheets if necessary

| Officer | Officer No. | Report Date | Supervisor |
|---|---|---|---|
| x DAVID TODD | 128 | 10,10,91 | x [signature] |

SFN 16751 (6-89)

Agency FARGO Police | ORI ND | Page 1 of 1

Narrative | ISN/TN or Case No. 91-9403 | Incident Date 10/10/91

AT 2235 hrs I went to 2820 Edgewood Drive to Assist officers TODD and Schakosky with Repeated Picketers at the JAYE BOYARD residence.

When I got there I saw Lt. Holman, officer Schakosky and officer TODD standing on the sidewalk next to 2820 Edgewood Drive with a group of adults and young people. Lt. Holman was explaining to them the Residential Picketing ordinance and advised them that they were in violation of same. He stated that they would be arrested if they failed to leave. Lt Holman repeated the warning several times and asked them if they understood the warning. Two of the men stated they did. they were later identified as Christopher KNEKLASE and Paul Mehl. A third male adult, later identified as Darold Larson stood in front of Lt. Holman and offered his hands to be handcuffed.

While I was in the squad car making arrangements for the Bailiff's van to come to our location, officer Todd asked me for more handcuffs. I gave him 4 sets of handcuffs.

3 Juveniles and 4 adults were taken into custody. the 4 adults (3 males & 1 female) were transported to Cass County Jail in violation of the picketing ordinance, and failure to obey a lawful order of a Police officer.

Officer x W.M. Hagerson | Officer No. 047 | Report Date 10/11/91 | Supervisor Mike Miller x

Use additional sheets if necessary

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SFN 16751 (6-89)



| Agency | ORI | Station or Case No. | Incident Date |
|---|---|---|---|
| Fargo Police | ND | 91-9403 | 10.10.91 |

Narrative

At 2229 hrs. 10-10-91 officer Todd and myself were dispatched to 2820 Edgewood Dr on the report of people picketing a residence.

I arrived at aprox. 2236 hrs. just behind officer Todd.

Upon my arrival I saw a group of about twenty people walking north on the sidewalk. Off. Todd radioed that it looked like the people were leaving. When the group reached a point aprox three houses north of 2820 they turned around and walked south.

The group walked south single file until they reached a point aprox. two houses south of 2820. The group then turned around and walked north again. When the group reached a point aprox. three houses north of 2820 they again turned and walked south.

When the first of the group reached the driveway of the house on the north side of 2820, Lt. Helman, off. Todd and myself stopped them. Lt. Helman waited for the group to get close and then informed them that they were in violation of the ordinance which prohibits the picketing of a private residence. He ordered them to leave the area or be arrested. It was at this point that an individual identified as Christopher Veneklase said they were just out walking and praying. Veneklase said it was his Constitutional right to pray and walk. Lt Helman told him that he was not stopping them from praying but that they were in violation of the picketing ordinance. Veneklase said they were not because they were not carrying any signs and that they were just walking silently. Lt. Helman told him he was not going to argue and again asked them to leave or they would be arrested. At this point the group moved to the north a few feet away from us and after a short time about half of the group left and went to several vehicles. There were

Use additional sheets if necessary

| Officer | Officer No. | Report Date | Supervisor |
|---|---|---|---|
| x M. Schlafly | 134 | 10.10.91 | x. |

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| Agency | ORI | Ref. or Case No. | Incident Date |
|---|---|---|---|
| Fargo Police | ND | 91-9403 | 10.9.91 |

Narrative

Seven people who again approached us. Four adults and three juveniles. As they approached us Lt. Holman again asked if they would leave. These seven then walked passed us and in front of 2820 at that point we placed the seven under arrest for unlawful picketing and failure to obey the lawful order of a police officer.

None offered any resistance and were taken into custody.

The three juveniles were transported to the station, booked and then released to their mother. The four adults were transported to the Cass County jail.

Mike Miller

Use additional sheets if necessary

| Officer | Officer No. | Report Date | Supervisor |
|---|---|---|---|
| x R. Schakesky | 134 | 10.10.91 | x |

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Supreme Court, U.S.
FILED
JUL 18 200
OFFICE OF THE CLERK

(2)

No. 00-1712

In The

# Supreme Court of the United States

CHRISTOPHER VENEKLASE, PAUL B. MEHL, DAROLD LARSON, NANCY EMMEL and JESSICA UCHTMAN,

*Petitioners,*

v.

CITY OF FARGO,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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## CITY OF FARGO'S BRIEF IN OPPOSITION

Respondent City of Fargo respectfully submits the following Opposition to the Petition for a Writ of Certiorari filed by Christopher Veneklase, Paul B. Mehl, Darold Larson, Nancy Emmel and Jessica Uchtman (hereinafter "Petitioners," "demonstrators," or "protestors").

## COUNTER-STATEMENT OF THE CASE

On a Thursday night in October 1991, between 10:00 p.m. and 10:30 p.m., a group of ten to fifteen protestors staged a demonstration outside the home of Fargo resident Jane Bovard. The protestors walked continuously back and forth, in single file, on the sidewalk in front of the Bovard home, including in their route the two to three houses on either side of the targeted residence. At least one demonstrator was in front of the Bovard home at all times. When Ms. Bovard returned home that night and observed the picketers, she was scared. She later testified that she called the Fargo police because she was concerned for her own safety as well as that of her neighbors. When the police arrived, they observed the protestors staging a targeted demonstration in front of the Bovard home. The police knew that Ms. Bovard was employed as the administrator of Fargo's sole abortion clinic. After observing the demonstrators for some time, the officers informed them that their actions violated Fargo's residential picketing ordinance. More than once, the officers

asked the protestors to leave. The police finally arrested those persons who refused to leave.[1]

The demonstrators subsequently brought claims against the City of Fargo and the arresting police officers alleging, among other things, violations of 42 U.S.C. § 1983 based on allegations of false arrest and a failure to train. In an interlocutory ruling, the court below held that the individual police officers were each entitled to qualified immunity based on their reasonable actions in light of the clearly established law at the time. *Veneklase v. City of Fargo*, 78 F.3d 1264 (8th Cir. 1996) (*Veneklase I*). The district court ultimately ruled that Fargo's residential ordinance was not "content neutral" and, accordingly, that the City of Fargo had violated Plaintiffs' constitutional rights. App. J1-J11. A jury trial was held solely on the issue of damages based on the non-content neutrality of the ordinance, and the jury awarded plaintiffs a total of $2,431 in damages. The judge subsequently awarded attorneys' fees and costs to Plaintiffs' counsel in the amount of approximately $52,000. App. I1-I2. The City of Fargo appealed. An *en banc* court reversed the judgment against the City of Fargo for damages and assessment of attorney fees and costs based largely on an intervening decision by this Court. See *Veneklase v. City of Fargo*, 248 F.3d 738 (8th Cir. 2001) (*Veneklase II*). The plaintiffs filed their Petition for Writ of Certiorari ["the Petition"] on May 14, 2001.

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[1] See *Veneklase v. City of Fargo*, 248 F.3d 738, 743 (8th Cir. 2001), citing *Veneklase v. City of Fargo*, 78 F.3d 1264, 1266 (8th Cir. 1996). Also see police reports. App. P1-P3.

## REASONS TO DENY THE WRIT

Prior to the Petition, the primary focus of the parties and the court below was whether Fargo's picketing ordinance was "content neutral". This Court's intervening decision in *Hill v. Colorado*, 530 U.S. 703 (2000), however, clarified that the Fargo ordinance is clearly content neutral and, appropriately, Petitioners have now abandoned that claim. See Petition at 9 n. 2.

That now-abandoned claim was Petitioners' only remaining viable cause of action in this litigation. Petitioners' overbreadth claim is moot. Moreover, even if it were not moot, Petitioners' overbreadth claim is directly and clearly governed by this Court's decision in *Frisby v. Schultz*, 487 U.S. 474 (1988), and, therefore, is also not meritorious. The other claims advanced by Petitioners are similarly not meritorious and were correctly decided by the Eighth Circuit below. Accordingly, Petitioners' writ should be denied.

### I. THE PETITION PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW IN CONFLICT WITH RELEVANT DECISIONS OF THIS COURT

#### A. Petitioners' Overbreadth Claim is Moot: the Fargo Ordinance was Repealed in 1998 and Only Prospective Relief is Available on a Claim that an Ordinance is Unconstitutionally Overbroad.

The Fargo residential picketing ordinance at issue in this case was repealed on January 26, 1998. See Fargo Ordinance 2843 (reproduced in the Appendix hereto). The City of Fargo has not reenacted the ordinance and has not

declared or demonstrated any intention of doing so.[2] Accordingly, the primary question presented by the Petition, namely whether the Fargo ordinance is overbroad on its face, is moot.[3]

The First Amendment overbreadth doctrine is limited to claims for prospective relief. See, e.g., *City of Houston v. Hill*, 482 U.S. 451, 459 n. 7 (1987) (stating that a person may have standing to seek prospective relief to challenge ordinance as overbroad even when the ordinance has

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[2] The City of Fargo did not repeal its ordinance in an attempt to defeat jurisdiction. Cf. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982) (holding that city's repeal of ordinance after district court held ordinance unconstitutional did not moot case because city had announced its intention to reenact ordinance if case was dismissed on mootness grounds). To the contrary, the City of Fargo abandoned the ordinance more than four years ago and it has never attempted, or stated that it intends, to reenact the residential picketing ordinance. See, e.g., *Massachusetts v. Oakes*, 491 U.S. 576, 582 (1989) (holding that amendment of law prohibiting pornography of minors mooted overbreadth challenge) ("Because the special concern that animates the overbreadth doctrine is no longer present after the amendment or repeal of the challenged statute we need not extend the benefits of the doctrine to a defendant whose conduct is not protected."); See also *Camfield v. City of Oklahoma City*, 248 F.3d 1214, 1223 (10th Cir. 2001) (holding that *Mesquite* applies to prevent case from being moot only where city intends to reenact ordinance); *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 116 (4th Cir. 2000) (same); *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 645 (6th Cir. 1997) (same); *Barilla v. Ervin*, 886 F.2d 1514, 1521 (9th Cir. 1989) (same).

[3] This Court is obligated, of course, to determine whether a live case or controversy exists before examining the merits of Petitioners' overbreadth claim. See, e.g., *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).

been repeatedly and constitutionally applied to that person in the past); *Secretary of State of Maryland v. Munson*, 467 U.S. 947, 958 (1984) ("Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society – to prevent the statute from chilling the First Amendment rights of other parties not before the court. Munson's ability to serve that function has nothing to do with whether or not its own First Amendment rights are at stake."); *New York v. Ferber*, 458 U.S. 747, 772-73 (1982) ("This requirement of substantial overbreadth may justifiably be applied to statutory challenges which arise in defense of a criminal prosecution as well as civil enforcement or actions seeking a declaratory judgment."). It does not give rise to damages because it is a doctrine limited to facial challenges, see, e.g., *City of Morales v. Chicago*, 527 U.S. 41, 52 (1999) ("the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.' ") quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612-615 (1973); *National Endowment for the Arts v. Finley*, 524 U.S. 569, 619 (1998) ("we have routinely understood the overbreadth doctrine to apply where the plaintiff mounts a facial challenge to a law investing the government with discretion to discriminate on viewpoint when it parcels out benefits in support of speech."); *Alexander v. United States*, 509 U.S. 544, 555 (1993) ("The 'overbreadth' doctrine . . . permits a [criminal] defendant to make a facial challenge to an overly broad statute restricting speech, even if he himself has engaged in speech that could be regulated under a more

narrowly drawn statute."). The doctrine does not permit the award of damages to compensate for injury resulting from application of the challenged ordinance. See, e.g., *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 309 (1986) (emphasizing that damages must always be designed to compensate for personal injury, even when the constitutional right implicated is the First Amendment); *Carey v. Piphus*, 435 U.S. 247, 254-55 (1978) (applying traditional principles of common law torts to Section 1983 claims, stating that damages may only compensate for constitutional injuries personally and actually suffered). Instead, the overbreadth doctrine permits "an individual who's own speech or expressive conduct may validly be prohibited or sanctioned . . . to challenge a statute on its face because it also threatens others not before the court – those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985). The doctrine was designed as a departure from traditional rules of standing to enable persons who are themselves unharmed by the defect in a statute nevertheless to challenge the statute on the ground that it may conceivably be applied unconstitutionally to others in other situations not before the Court. See, e.g., *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

Accordingly, when persons invoke the overbreadth doctrine, as Petitioners' attempt to do in this case, they are not asserting a claim for damages based on the doctrine, since any claim for damages is necessarily a function of how the ordinance has been applied to them. See

*Stachura*, 477 U.S. at 309; *Carey*, 435 U.S. at 254-55.[4] Petitioners' facial overbreadth challenge to the Fargo ordinance is for prospective relief only. Because the ordinance was repealed in 1998, the facial challenge is now moot.[5] Accordingly, because the Petition does not present this Court with a case or controversy as to the primary question presented, the petition should be denied.

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[4] In his dissent from the *en banc* decision below, Judge Arnold cites two cases for the proposition that "[a] city is liable for damages under Section 1983 if its officers deprive someone of liberty pursuant to a facially unconstitutional municipal ordinance." See *Veneklase*, 248 F.3d at 753 (citing *Douglas v. Brownell*, 88 F.3d 1511 (8th Cir. 1996) and *Gerritsen v. City of Los Angeles*, 994 F.2d 570 (9th Cir. 1993)). Yet neither stands for the principle that a plaintiff asserting a facial overbreadth challenge to an ordinance (in other words, not an as-applied challenge based on personal injury) is entitled to damages. In *Douglas*, the protestors challenged both residential picketing and parade-permit ordinances seeking damages, injunctive, and declaratory relief under Section 1983. *Douglas*, 88 F.3d at 1514. The court in *Douglas* determined that even though the doctor moved from the town, the protestors still had standing because their challenge was not solely based on their desire to picket the doctors' residence. In *Gerritsen*, the Court is clear that the damages awarded were only as to the "as-applied" claims. See, e.g., *Gerritsen*, 944 F.2d at 577. Contrary to the dissent's assertion, overbreadth claims do not give rise to damages.

[5] To the extent that Petitioners attempt to bootstrap their overbreadth challenge into a claim for damages, they are misguided. Petitioners are eligible for damages for their own personal injuries, in other words, for any damages that result from application of the ordinance to them. That claim presents a distinctly as-applied challenge to the ordinance and, for the reasons set forth below, is similarly defective.

### B. The Eighth Circuit Correctly held that the Fargo Ordinance is Nearly Identical to the Ordinance Held Facially Constitutional in *Frisby*.

Even if the repealed Fargo ordinance did not present a moot question on its face, Petitioners acknowledge that it was "virtually identical" to the ordinance upheld as constitutional on its face by this Court in *Frisby*. Therefore, the court below correctly determined that the Fargo ordinance, like the *Frisby* ordinance, was constitutional on its face. See *Veneklase v. City of Fargo*, 78 F.3d at 1268 n. 4; 904 F.Supp. at 1053-54. The facial construction of the ordinance does not present an important question of federal law, but a straightforward one correctly resolved by the Eighth Circuit consistent with this Court's relevant decisions.

The prohibitory language of the Fargo ordinance states:

> 10-1202. Picketing of dwellings prohibited. – No person shall engage in picketing the dwelling of any individual in the City of Fargo.

*Veneklase II*, 248 F.3d at 741. The Fargo ordinance also defined the term "[d]welling" to mean "any structure or building, or dwelling unit within a building, which is used as a place of residence" and the term "[p]icketing" to mean "the practice of standing, marching, or patrolling by one or more persons inside of, in front, or about any premises for the purpose of persuading an occupant of such premises or to protest some action, attitude or belief." *Veneklase II*, 248 F.3d at 741.

Similarly, the ordinance upheld by this Court in *Frisby* provides:

> It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield.

*Frisby v. Schultz*, 487 U.S. 474, 477 (1988). The term "picketing" was determined to mean "posting at a particular place." See *Frisby*, 487 U.S. at 482. Fargo's ordinance, like the *Frisby* ordinance is not overly broad on its face.

### 1. The Fargo Ordinance is Susceptible on its Face to a Narrow Construction that Avoids Constitutional Difficulties.

Like the *Frisby* ordinance, the Fargo ordinance is on its face readily susceptible to a narrow construction that avoids constitutional difficulties. Ordinances should be construed to avoid constitutional difficulties. See, e.g., *Frisby*, 487 U.S. at 483 (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975); *Broadrick*, 413 U.S. at 613; *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988)). In *Frisby*, this Court construed the ordinance before it narrowly in an effort to uphold the ordinance as constitutional. *Frisby*, 487 U.S. at 482. Specifically, this Court recognized that "the use of the singular form of the words 'residence' and 'dwelling' suggests that the ordinance is intended to prohibit only picketing focused on, and taking place in front of, a particular residence." *Id.* at 482. Moreover, the definition of picketing was "in line with viewing the ordinance as limited to activity focused on a single residence." *Id.* at 483. Accordingly, this Court concluded that the ordinance should be construed narrowly and, so construed, passed constitutional muster. *Id.*

The Eighth Circuit likewise correctly construed the Fargo ordinance by applying the precise analysis this Court applied in *Frisby*. The court held that the Fargo ordinance, like the *Frisby* ordinance, was susceptible to a narrow construction sufficient to uphold the ordinance as constitutional on its face. Like the *Frisby* ordinance, the Fargo ordinance used the singular form of the word "dwelling." See *Veneklase II*, 248 F.3d at 741 (citing Fargo Municipal Code § 10-1201(A), 10-1201(B)). Like the *Frisby* ordinance, the Fargo ordinance clearly defined its terms to apply to a single residence. See *Veneklase II*, 248 F.3d at 741 (citing Fargo Municipal Code § 10-1201(A) (defining dwelling in strictly singular terms, such as "any structure or building")). Finally, like the *Frisby* ordinance, the Fargo ordinance defined picketing to apply to a single home. See *Veneklase II*, 248 F.3d at 741 (citing Fargo Municipal Code § 10-1201(A) (limiting picketing to activities involving "any premises")).

Accordingly, like the ordinance in *Frisby*, the Fargo ordinance is constitutional on its face. This Court has stated that, "when considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference. . . . In accommodating these competing interests the Court has held that a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts. . . . " See *Erznoznik*, 422 U.S. at 216. Indeed, as this Court has also stated, application of the overbreadth doctrine to invalidate a local ordinance is "strong medicine . . . employed by the Court sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613. Thus, the Eighth Circuit correctly followed *Frisby* by

holding that the Fargo ordinance, narrowly construed, was constitutional on its face.

The Fargo ordinance was virtually identical to the ordinance upheld as constitutional on its face in *Frisby*. The Eighth Circuit's decision correctly ruled that the Fargo ordinance was similarly constitutional on its face.

### 2. Expansive Responses by an Enforcement Officer to Hypothetical Questions Are Not Determinative of How An Ordinance Should Be Construed on its Face.

Petitioners and the dissent in *Veneklase II* attempt to create a question of federal law from the deposition testimony of the former Fargo police chief regarding the scope of the now-repealed ordinance. Indeed, the dissent's conclusion that the Fargo ordinance was overbroad rests almost entirely on that deposition colloquy. See *Veneklase II*, 248 F.3d at 752. The law is clear, however, that when the constitutionality of an ordinance is considered *on its face*, it is inappropriate for a court to consider every hypothetical fact pattern that might possibly invite application of the ordinance. Indeed, in *Frisby*, this Court stated:

> Of course, this case presents only a facial challenge to the ordinance. Particular hypothetical applications of the ordinance . . . may present somewhat different questions. Initially, the ordinance by its own terms may not apply in such circumstances, since the ordinance's goal is the protection of residential privacy, . . . , and since it speaks only of a "residence or dwelling," not a place of business. . . . Moreover, since our First

> Amendment analysis is grounded in protection of the unwilling residential listener, the constitutionality of *applying the ordinance to such hypotheticals remains open to question. These are, however, questions we need not address today in order to dispose of appellees' facial challenge.*

*Frisby*, 487 U.S. at 488 (internal citations omitted) (emphasis added); see also, *FCC v. Pacifica*, 438 U.S. 726, 743 (1978) ("We will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable, . . . but will deal with those problems if and when they arise.") (internal citations omitted); *Lindsey v. Normet*, 405 U.S. 56, 65 (1972) ("[P]ossible infirmity in other situations does not render [a statute] invalid on its face."); *Allen-Bradley Local No. 1111, United Electrical, Radio and Machine Workers of America v. Wisconsin Employment Relations Board*, 315 U.S. 740, 746 (1942) (court will not "assume in advance that a State will so construe its law as to" make it unenforceable).

Moreover, it is well established that, when presented with expansive interpretations of a local law otherwise capable of construction without such interpretations on its face, this Court has rejected those interpretations:

> The law in question, a criminal statute, is not administered by any agency but *by the courts*. . . . [W]e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.

*Crandon v. United States*, 494 U.S. 152, 177-78 (1990) (Scalia, J. concurring) (emphasis added). Thus, in *Crandon*, this Court declined to rely on an expansive

construction of a criminal statute. See generally, *Crandon*, 494 U.S. at 152.

Similarly, the facial construction of the Fargo ordinance is not determined by deposition responses to hypothetical questions about possible future applications of the ordinance. Cf. *Schultz v. Frisby*, 877 F.2d 6, 8 (7th Cir. 1989) ("[t]he Constitution does not require [a city] to answer hypothetical questions before it may enforce the law. Incompleteness is a curse of language, as of human imagination. To say that precision is a precondition to enforcement is to say that no ordinance regulating speech may stand – a proposition the Supreme Court has rejected over and over again."); *Broadrick*, 413 U.S. at 615 ("[T]here comes a point where that effect – at best a prediction – cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.").

Moreover, it is undisputed that the individual police officers in this case were entitled to qualified immunity because their actions were objectively reasonable in light of the constitutional law that was clearly established at the time. *Veneklase I*, at 1269. It is well established that police officers are not expected to be constitutional scholars who anticipate legal developments See, e.g., *Crawford-El v. Britton*, 523 U.S. 574, 590 (1998). The police chief's deposition statements, therefore, regarding the possible applications of the statute, could not be regarded

as controlling as to the issue of whether the statute is facially constitutional – they were not even controlling on the issue of individual liability, since the Eighth Circuit held that the law was not clearly established on the subject.

On its face, the Fargo ordinance was readily susceptible to a narrowing and constitutional construction and the Eighth Circuit properly did not regard the police chief's deposition testimony regarding the possible scope of the ordinance to be determinative of the construction of the ordinance.

### 3. The City of Fargo Had a Legitimate and Substantial Interest in Prohibiting Targeted Picketing of a Person's Residence and the Ordinance Did Not Ban Prayer on Public Sidewalks.

This Court has consistently recognized that cities have a legitimate and substantial interest in prohibiting the targeted picketing of a resident's home. Indeed this Court has stated that the "well-being, tranquility, and privacy of the home," are local interests "of the highest order in a free and civilized society." *Frisby*, 487 U.S. at 484 (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980)). This Court has often "remarked on the unique nature of the home, 'the last citadel of the tired, the weary, and the sick,' and . . . recognized that '[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value.' " *Frisby*, at 487 U.S. at

484-85 (quoting *Gregory v. Chicago*, 394 U.S. 111, 125 (1969) (Black, J., concurring), and *Carey*, 447 U.S. at 471)).

In *Frisby*, this Court recognized the power of the government to protect the right of individuals in their homes:

> The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech. See *Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530, 542 (1980). Cf. *Bolger v. Youngs Drug Products Corp.* supra, at 72. The target of the focused picketing banned by the Brookfield ordinance is just such a 'captive.' The resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech. Cf. *Cohen v. California*, 403 U.S., at 21-22 (noting ease of avoiding unwanted speech in other circumstances). Thus, the 'evil' of targeted residential picketing, the very presence of an unwelcome visitor at the home, *Carey*, supra, at 478 (Rehnquist, J., dissenting), is 'created by the medium of expression itself.' See *Taxpayers for Vincent*, supra, at 810. Accordingly, the Brookfield ordinance's complete ban of that particular medium of expression is narrowly tailored.

*Id.* at 487. Thus, this Court has held that, "even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy. The devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt." *Frisby*, 487 U.S. at 486.

The group of ten to fifteen protestors who walked back and forth in front of Ms. Bovard's home on a late weeknight were not simply a "non-focused silent prayer line passing by five to eight houses," as asserted in Petition at 12.[6] They were engaged in a directed protest of the home of the City's sole abortion clinic administrator. At all times during their late-night demonstration, at least one member of the Petitioners' group was in front of the targeted home, as the group continuously marched back and forth in a route that clearly placed Ms. Bovard's home at its epicenter. The Fargo resident targeted by Petitioners' late-night demonstration was certainly an unwilling listener captive in her home. She called on the Fargo police to protect her, and the City of Fargo clearly had a legitimate and substantial interest in doing so.

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[6] Fargo's ordinance did not ban prayer on public sidewalks but did prohibit focused residential picketing. Assuming the protestors in this case were engaged in prayer, that prayer was part of the overall conduct focused on the targeted residence and properly prohibited. See, *Cox v. New Hampshire*, 312 U.S. 569, 578 (1941) (stating that parade permit ordinance did not interfere "with religious worship or the practice of religion in any proper sense . . . [and] only [constituted] the exercise of local control over the use of streets. . . . "). Moreover, this Court has recognized that "picketing" can include a wide variety of activities, including prayer. See *Frisby*, 487 U.S. at 486 (also defining the conduct falling within the picketing ordinance as conduct not for the purpose of disseminating a message to the general public, but for the purpose of intruding on the targeted resident).

### C. Petitioners' As-Applied Claim is Not Properly Before this Court Because Petitioners Did Not Appeal the District Court's Finding That Fargo's Ordinance Was Not a Policy or Failure to Train that Violated the Constitution.

The court below correctly held that there was no viable as-applied challenge to the Fargo ordinance because the district court's rulings had specifically and correctly addressed and rejected Petitioners' claim that the City of Fargo had a policy authorizing illegal arrests or the City had failed to train its police officers. See *Veneklase II*, 248 F.3d at 748. Petitioners, however, did not appeal those findings by the district court to the court of appeals, and they do not argue even to this Court that either of the two lower courts erred. See *Veneklase II*, 248 F.3d at 747-48. Instead, Petitioners argue that their as-applied claim is meritorious on the ground that the City of Fargo did not have a legitimate and substantial interest in prohibiting their actions. As discussed, supra, however, the City of Fargo clearly did have a legitimate and substantial interest in prohibiting the targeted residential demonstrating that gave rise to Petitioners' arrest. Accordingly, Petitioners' as-applied claim is foreclosed and their arguments regarding the as-applied constitutionality of the Fargo ordinance provide no basis to grant their Petition.[7]

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[7] Even Judge Arnold, in his dissent below, does not contend that the protestors in this case have a surviving as-applied challenge. See *Veneklase*, 248 F.3d at 749-753 (dissent).

### D. Even If The As-Applied Claim was Not Foreclosed, The City Is Not Liable because the City Did Not Fail to Properly Train Its Police Officers and the City Did Not Have a Policy or Custom Which Authorized the Violation of State or Federal Law.

Even assuming *arguendo* that Petitioners preserved an as-applied challenge, the Eighth Circuit correctly held that, even if Petitioners could prove that the ordinance had been unconstitutionally applied to them, it would be necessary to demonstrate that the City had (a) a policy or custom authorizing conduct contravening federal and state constitutions and law, or (b) deficient police training, and Petitioners failed to show either. See *Veneklase II* at 748.

Petitioners contend that the City should be liable for the arrests for any protesting that occurred beyond Ms. Bovard's single residence. They claim that because they demonstrated in front of the two or three houses on either side of the targeted residence, their actions were outside the scope of the Fargo ordinance. Accordingly, they maintain that they were arrested because the police were not properly trained and unconstitutionally applied the ordinance to them.

A failure to train results in liability, however, only in limited and narrow circumstances, when such failure amounts to deliberate indifference to the constitutional rights of others. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389 (1989). Indeed, a failure to train can be the basis for liability only where it "reflects a 'deliberate' or 'conscious' choice by a municipality." *Id.* at 389. The training

deficiency "must be closely related to the ultimate injury." *Id.* at 391.

In *Veneklase I*, the Eighth Circuit held that the law regarding the permissible scope of application of the Fargo ordinance was not clearly established at the time of Petitioners' arrests. *Veneklase I*, 78 F.3d at 1269. In the opinion below, the Eighth Circuit correctly held that, regarding deficient police training, no liability can flow from the alleged failure to train the Fargo police officers:

> In light of the Eighth Circuit's ruling [*Veneklase I*] that the law regarding the parameters of the First Amendment right to protest against abortion in a residential area was not clearly established at the time of plaintiffs' arrest, the City's failure to its train [sic] police officers could not serve as the moving force behind the violation of plaintiffs' First Amendment rights. Since the parameters of plaintiffs' First Amendment rights were still in question, any training of the City's police officers would necessarily leave those parameters in doubt. Consequently, the lack of training by the City cannot be the moving force behind the violation of plaintiffs' constitutional rights.

*Veneklase II*, 248 F.3d at 748, citing Dist. Ct. Mem. and Order, April 10, 1997.

Petitioners' attempt to manufacture a significant question of law out of the Eighth Circuit's straightforward analysis plainly fails. This Court has held that, in order to constitute deliberate indifference sufficient to sustain a failure to train claim against a municipality, "the need for more or different training" must be "obvious." See *City of Canton*, 489 U.S. at 390. The court of appeals

correctly held that it was not possible for the City of Fargo to have been "deliberately indifferent" to rights that were not clearly established, let alone obvious, at the time of the Petitioners' arrests. See *Veneklase II*, 248 F.3d at 748.

Similarly, the Eighth Circuit correctly held that the Fargo residential picketing ordinance did not constitute a policy or custom authorizing the violation of federal or state law. Fargo's residential picketing ordinance was virtually identical to the ordinance in *Frisby* and, indeed, for the short time the ordinance was in effect prior to being repealed, there were no arrests made or violations prosecuted until Petitioners' arrests in the fall of 1991. This Court's decision in *Frisby* upheld a city's ability to prohibit residential protesting narrowly focused on a single residence. See *Frisby*, 487 U.S. 482-86. Petitioners' actions in this case clearly fall within that category of unprotected conduct and, thus, their as-applied claim fails for this reason as well.

Petitioners argue (albeit in the context of advancing their facial overbreadth claim) that *Frisby* was limited to picketing activities that occurred solely in front of a single targeted residence and that by extending their demonstration to the two or three houses on either side of their target's home, they were beyond the reach of both *Frisby* and the Fargo residential picketing ordinance. Once again, Petitioners are incorrect. See *Veneklase v. City of Fargo*, 200 F.3d 1111, 1118 (8th Cir. 1999) (vacated); see also *Veneklase II*, 248 F.3d at 743 ("[w]e essentially adopt the panel opinion in [the vacated *Veneklase* opinion], 200 F.3d 1111. . . . ").

The emphasis of this Court's ruling in *Frisby* was that focused picketing of an individual's residence was conduct that a city could properly proscribe by a residential picketing ordinance. This Court repeatedly stressed that it was the targeted and focused nature of the picketers' activities towards a single residence that rendered their demonstration able to be proscribed. *Id.* at 483-85. Although the demonstrators in *Frisby* contained their actions to an area in front of one house, the targeting in this case was no less focused upon a single residence, notwithstanding that Petitioners extended their route to the two or three houses on either side of Ms. Bovard's home. At all times, at least one protestor was passing in front of Ms. Bovard's home, as the group marched in front of the targeted home and two or three houses on both sides of the home. See *Veneklase II*, 248 F.3d at 743.

As the United States Court of Appeals for the Seventh Circuit stated:

> Surely [protestors] can't evade the law by standing in front of the [targeted] home and occasionally jumping one house on either side.

*Schultz v. Frisby*, 877 F.2d 6, 8 (7th Cir. 1989); see also *Douglas*, 88 F.3d at 1520 (upholding residential picketing ordinance that proscribed targeted picketing of residence when protestors extended course to three houses on each side of target as narrowly tailored). Petitioners in this case attempted to do precisely that. The Eighth Circuit correctly denied their attempt to evade the narrow reach of Fargo's former residential picketing ordinance. Accordingly, because the Eighth Circuit correctly held that the Fargo ordinance was appropriately applied in this case, the Petition should be denied.

## II. JUDGE BYE PROPERLY REFUSED TO RECUSE HIMSELF

Petitioners argue that Circuit Judge Kermit Bye should have recused himself in this case because his former law firm represented Ms. Bovard and the abortion clinic in litigation not related to this case. As Judge Bye stated, Petitioners' Motion to Disqualify him:

> [I]s premised on the fact that the law firm of which I was a member prior to becoming a judge, Vogel, Weir, Hunke & McCormick, Ltd., of Fargo, North Dakota (the "Vogel law firm"), had represented Fargo Women's Health Organization in two cases at approximately the same time the appellees were arrested. One case was a medical malpractice action, in which both Bovard and the clinic were named defendants. See *Sabot v. Fargo Women's Health Org., Inc.*, 500 N.W.2d 889 (N.D. 1993). The other, with the clinic as the plaintiff, was a civil rights suit against the state seeking declaratory and injunctive relief from the North Dakota Abortion Control Act. See *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526 (8th Cir. 1994).
>
> None of the *Veneklase* plaintiffs were parties to either of those lawsuits. Further, neither Bovard nor the clinic is or has been a party in this litigation, although Bovard was called to testify as a witness as to the plaintiffs' damages. The Vogel law firm has never been involved in any manner in this litigation, nor has it ever represented any of the *Veneklase* plaintiffs or the appellant in any other matter. Neither Bovard nor the clinic were at any time in the past ever personal clients of mine. I was never involved as a lawyer or otherwise in any of the matters in

> which my former law firm several years ago represented them.

*Veneklase v. City of Fargo*, 236 F.3d 899, 900 (8th Cir. 2000); App. E3.

Judge Bye declined to recuse himself, explaining that his law firm's representation of Bovard and the Fargo Women's Health Organization was "isolated, unrelated litigation going back six and seven years prior to my taking the bench." *Id.* Judge Bye went on to state:

> Jane Bovard is not a party in this case. Nor is she even an interested third party with a stake in the outcome. The ordinance at issue in this case has been amended; if plaintiffs or others picket outside Bovard's home in the future, they may still be arrested, but under a different anti-residential picketing ordinance. The court's decision as to the constitutionality of this ordinance therefore has no practical effect on Bovard.
>
> Even if Bovard had an interest in this matter, my former law firm never represented her in connection with this case. Section 455(b) lists specific situations in which a judge must recuse himself or herself from participation in a case; one of these situations is "[w]here in private practice he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter . . . " 28 U.S.C. § 445(b)(2). My situation is several steps removed from that described in § 445(b)(2); it is so far removed from a case in which actual bias may be found as to make even the appearance of bias improbable.

> Canon 3c(1) of the Code of Conduct for United States Judges tracks almost identically the wording contained in 28 U.S.C. § 455. The Canon does not require recusal. It has been in excess of six years since my former law firm represented the clinic in *Schafer* and seven years since the firm defended Bovard and the clinic in *Sabot*. I never had any professional or personal relationship of any kind or nature with either, and most certainly no involvement as a lawyer in any of those cases which took place in the early part of the 1990's.

*Id.* at 900-901.

Justice Kennedy, in a concurring opinion in *Liteky v. United States*, 510 U.S. 540 (1994), explained the high threshold that must be met before a judge should be recused or disqualified from hearing a case:

> Section 455(a) provides that a judge 'shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.' For present purposes, it should suffice to say that § 455(a) is triggered by an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have reasonable grounds to question the neutral and objective character of a judge's rulings or findings. I think all would agree that a high threshold is required to satisfy this standard. Thus, under § 455(a), a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute.

*Id.* at 557, 558 (Kennedy, J., concurring).

There is no evidence or indication that Judge Bye's attitude or state of mind is so resistant to fair and dispassionate inquiry as to cause a party, the public or a reviewing Court to have reasonable grounds to question his neutral and objective findings.

## III. THE PETITION PRESENTS NO CONFLICT OF DECISIONS

Petitioners contend that the Eighth Circuit's decision that the Fargo ordinance was constitutional on its face is in conflict with decisions from other United States courts of appeals and, by implication, that this Court should exercise jurisdiction in order to resolve that conflict. There is no circuit split, however, and accordingly the Petition should be denied.

Petitioners attempt to characterize the Sixth Circuit's decision in *Vittitow v. City of Arlington*, 43 F.3d 1100 (6th Cir. 1995) as presenting a direct conflict with the Eighth Circuit decision below. Petitioners ignore, however, that the court in *Vittitow* did not decide a facial challenge to a city's residential picketing ordinance. *Vittitow* involved an appeal from the terms of a district court's preliminary injunction on an as-applied challenge to a residential picketing ordinance and, therefore, it does not conflict with the *Veneklase II* holding that the Fargo ordinance was constitutional on its face. See *Vittitow*, 43 F.3d at 1100.

Indeed, in *Vittitow*, the Sixth Circuit acknowledged that, if the ordinance had been examined on its face and determined to be "facially valid," the city's enforcement of the ordinance would have to be determined on a case-by-case basis. See *Vittitow*, 43 F.3d at 1106. In *Vittitow*,

however, the court regarded the challenge to be an as-applied one, stating that a different course was required because the challenge was as-applied by virtue of the actual enforcement of the ordinance. *Id.* The Sixth Circuit did not regard the district court's preliminary injunction either to be sufficiently clear, see 43 F.3d at 1105 n. 6, or sufficiently tailored under this Court's decision in *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994), for the injunction to stand. See *Vittitow*, 43 F.3d at 1105-06.

Indeed, a significant difference between *Vittitow* and this case is that in this case the Eighth Circuit addressed the constitutionality of an ordinance while *Vittitow* involved the scope of an injunction, a distinction this Court has recognized in requiring that an injunction must be more precise than an ordinance. See *Madsen*, 512 U.S. at 764-65. An injunction must "burden no more speech than necessary," *id.*, while an ordinance – drafted through legislative compromise – must only be "narrowly tailored." *Frisby*, 487 U.S. at 482.

In short, *Vittitow* is not in direct conflict with the decision below because the Eighth Circuit clearly construed an ordinance on its face – not an injunction as applied. See *Vittitow*, 43 F.3d at 1105.[8] Similarly, the two

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[8] In *Douglas v. Brownell*, the Eighth Circuit had held that an ordinance that prohibited picketing the area immediately in front of a doctor's home and one house on each side of his home was constitutional. 88 F.3d 1511, 1520 (8th Cir. 1996). Unlike the injunction in *Vittitow*, which was a complete ban on residential picketing, the *Douglas* ordinance (and similarly the Fargo ordinance), allowed picketing through the neighborhood. *Douglas*, 88 F.3d at 1520. Protestors were not prohibited from "passing by" the targeted residence (as they would have been

other cases cited by Petitioners as creating "conflicts in principle" are red herrings not in conflict with the Eighth Circuit's decision – either in principle or in reality. The Eleventh Circuit's decision in *Lucero v. Trosch*, 121 F.3d 591 (11th Cir. 1997), was an appeal of a Freedom of Access to Clinic Entrance injunction; it did not involve the construction of an ordinance. In *Lucero*, the court invalidated an injunction that provided a 200-foot buffer zone around all clinic employees' residences because the injunction was not sufficiently tailored. *Id.* at 606. Nevertheless, the court recognized that this Court's decision in *Madsen* "makes clear that its precedents support restriction of targeted picketing rather than a generalized restriction." *Lucero*, 121 F.3d at 606. Thus, *Lucero* in no way conflicts – and in fact it is consistent with – the decision below.

Similarly, the Seventh Circuit's opinion on remand in *Schultz v. Frisby*, 877 F.2d 6 (7th Cir. 1989), does not conflict with the *Veneklase* decision, as the holding was limited to declining a request to certify a question to the Wisconsin Supreme Court regarding construction of the ordinance. See *Schultz*, 877 F.2d at 7 ("So far as *this* case is concerned the meaning of the ordinance is what the Supreme Court said it means, and having this meaning is constitutional.") (emphasis in original). Thus, the issue of construing the ordinance was not before the Seventh Circuit because precisely that issue had already been decided by this Court in *Frisby*. Nevertheless, in *dicta* the Seventh Circuit remarked that, "The Constitution does

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under the *Vittitow* injunction) unless they were engaged in "focused" picketing.

not require [the city] to answer [all questions regarding the scope of the ordinance as applied] before it may enforce the law. . . . To say that precision is a precondition to enforcement is to say that no ordinance regulating speech may stand – a proposition the Supreme Court has rejected over and again." See *Schultz*, 877 F.2d at 8. Moreover, the court acknowledged that this Court's decision in *Frisby* allowed for application of a residential picketing ordinance beyond a single home. *Id.* at 8 ("The trial scheduled for August 1989, and subsequent appellate proceedings in the Wisconsin courts, may elucidate the meaning of the ordinance as applied to picketing that takes in several houses but might still be thought to dwell on one."). The *Schultz* decision not only does not conflict with the *Veneklase* decision below, like *Lucero*, it supports it.

Thus, a careful examination of the cases cited by Petitioners belies their efforts to manufacture a split in the circuits. Accordingly, because there is no split in authority between the Eighth Circuit's decision below in *Veneklase II* and the decisions in *Vittitow*, *Lucero*, or *Schultz*, this Court should deny the Petition.

## CONCLUSION

WHEREFORE, the City of Fargo respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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July 18, 2001

## APPENDIX

Fargo Municipal Code Ordinance No. 2843.....A1

OFFICE OF THE CITY ATTORNEY
FARGO, NORTH DAKOTA

ORDINANCE NO. 2843

AN ORDINANCE REPEALING ARTICLE 10-08 OF CHAPTER 10 OF THE FARGO MUNICIPAL CODE RELATING TO PICKETING

Be It Ordained by the Board of City Commissioners of the City of Fargo:

*Section 1. Repeal.*

Article 10-08 of the Fargo Municipal Code is hereby repealed in its entirety.

*Section 2. Effective Date.*

This ordinance shall be full force and effect from and after its passage and approval.

/s/ Bruce W. Furness
Bruce W. Furness, Mayor

(SEAL)

Attest:

/s/ Carol J. Kraft
Carol J. Kraft, City Auditor

First Reading: 01/12/98
Second Reading: 01/26/98
Final Passage: 01/26/98

Supreme Court, U.S.
FILED
AUG 6 2001
CLERK

(3)

NO. 00-1712

In The
SUPREME COURT OF THE UNITED STATES

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CHRISTOPHER VENEKLASE, PAUL B. MEHL, DAROLD LARSON, NANCY EMMEL AND JESSICA UCHTMAN,
*Petitioners,*

v.

CITY OF FARGO,
*Respondent.*

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On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

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# REPLY TO BRIEF IN OPPOSITION

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## REPLY TO BRIEF IN OPPOSITION

### I. Reply to Counter-Statement of the Case

The only remarkable aspect of Respondent's Counter-Statement of the Case is the liberty taken with the record to suggest that Petitioners' conduct had focused on Jane Bovard's residence — as in the following passage:

> The protestors walked continuously back and forth, in single file, on the sidewalk in front of the Bovard home, including in their route the two to three houses on either side of the targeted residence. At least one demonstrator was in front of the Bovard home at all times.

Respondent's Brief at 1. *See also id.* at 16.

Not only is it undisputed that no one ever walked "back and forth . . . in front of the Bovard home" — even Respondent indirectly acknowledges the 6 to 8 house route — but the misleading allegation that "[a]t least one demonstrator was in front of the Bovard home at all times" was not heard until well after this litigation began: *i.e.*, when Respondent began to get educated about *Frisby*. It is apparent that that allegation — which appears nowhere in the police reports [App. P] — was spawned by Respondent's desire to create an image of "targeted" picketing after Respondent realized that Petitioners' conduct was protected by *Frisby*. This Court must not be misled.

With 15 to 20 people walking in single file in front of 6 to 8 houses, it is likely that at least one person was always in front of *every* home along the route. Indeed, such a conclusion is required by the *unrebutted* fact that Petitioners gave no emphasis to Bovard's home or to any other home. *See* Affidavit of Christopher Martin Veneklase, App. L, ¶¶ 4, 10. Arresting Officer Jon Holman finally conceded this

reality when pressed under oath:

> MR. CONDIT: But their personal conduct was not emphasizing Bovard's residence, and it wasn't emphasizing any of the other residences . . . .
>
> HOLMAN: Jane Bovard's house was in the middle.
>
> MR. CONDIT: Their conduct was not giving any special emphasis to her or any other house.
>
> HOLMAN: I don't recall any.

Holman Deposition, 8th Cir. Jt. App. at 149-50.

If Respondent wants to defend its enforcement practices on *Frisby* grounds, it should do so with candor and refrain from mischaracterizing uncontested facts to create the fiction of "targeted" picketing — which never occurred in this case.

## II. Respondent's Brief in Opposition Reinforces the Reasons for Granting the Writ.

### A. Importance of Constitutional Question

In his concurrence in *Frisby v. Schultz*, 487 U.S. 474 (1988), Justice White expressed significant doubt about the residential picketing ordinance as written, but was comfortable enough with this Court's narrowing (single residence) construction to "await further developments." *Id.* at 491. Thirteen years later, the disturbing "developments" in the Eighth Circuit permit a city to criminalize precisely what was protected under *Frisby*. Respondent's Brief in Opposition ("Brief") presents nothing to reconcile the Eighth Circuit's anti-picketing, anti-prayer decision with *Frisby*.

This Court reviewed *Frisby* "[b]ecause the question presented [was] of *substantial importance* . . . ." *Frisby*, 487 U.S. at 479 (emphasis added). The justification for review is at least as compelling in this case, where the freedom to

picket, pray or even walk silently on residential sidewalks — a traditional public forum — has been nullified and left to the discretion of any police officer who claims to perceive a "target" along the route. Should this Court permit the Eighth Circuit decision to stand, no lawyer in the country will be able to advise a client with any degree of certainty about how to picket (or pray) lawfully in a residential neighborhood.

### B. Circuit Conflict

Respondent argues that there is no conflict between the decision below and cases from the other circuits. Brief at 25-28. There can be no doubt, however, that the factual scenarios presented and the *Frisby* arguments posed in this case and in *Vittitow v. City of Upper Arlington*, 43 F.3d 1100 (6th Cir. 1995), are similar enough to render the two interpretations of *Frisby* irreconcilable. The obviousness of the conflict may be muddied by the way Respondent mischaracterized *Vittitow*, necessitating this clarification.

In *Vittitow* the district court enjoined an unconstitutional application of a *Frisby-style* ordinance. The Plaintiffs appealed the district court's creation of a bubble zone as part of its injunction against the city,[1] which cross-appealed and argued that its *Frisby*-style ordinance could be enforced as a ban beyond the sidewalk in front of a single residence. The Sixth Circuit rejected that argument and enforced this Court's literal holding in *Frisby*. *See Vittitow*, 43 F.3d at 1107. Notwithstanding any ordinance/injunction distinction, the Sixth and Eighth Circuits have now addressed precisely the

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[1] Respondent is wrong when it states that "the injunction in *Vittitow* was a complete ban on residential picketing." Brief at 26, n.8. More accurately, Upper Arlington had tried to enforce its ordinance as a total ban (just like Fargo), thereby requiring injunctive relief.

same legal question on similar facts and reached diametrically opposite conclusions about *Frisby*.

## III. Petitioners' Reply to Respondent's Legal Analysis

### A. Facial Overbreadth

Respondent now suggests, for the first time, that the facial overbreadth of the Fargo ordinance is a moot issue, based upon principles of third party standing.[2] Brief at 3-7. Respondent further asserts that "[t]he First Amendment overbreadth doctrine is limited to claims for prospective relief," Brief at 4, without citing a single case to support that limitation. Indeed, some of the very cases cited by Respondent permitted criminal defendants to attack the *past* enforcement of an overbroad ordinance. Petitioners merely do the same here in a civil action, seeking damages for actual injury suffered when they were arrested under a facially invalid ordinance. Respondent is really arguing that one may never recover civil damages solely for being arrested under a facially overbroad ordinance, and that liability for damages is necessarily limited to how an ordinance was *applied* to an arrestee. None of the case law cited by Respondent stands for that proposition either.

Respondent alternatively argues that the Fargo ordinance is facially valid because a virtually identical ordinance was upheld in *Frisby*. Brief at 8-11. Respondent's argument boldly disregards the constitutionally-necessary narrowing construction set out in *Frisby*. The arrest of Petitioners for walking a non-intrusive route in front of six to eighth houses was merely one application of Fargo's general residential picketing ban. Ignorant of *Frisby*, Respondent failed to narrow its facially overbroad ordinance, both in theory and in

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[2] On this point, Petitioners are compelled to alert this Court that the repeal of Fargo's ordinance, Brief at App. A, was never entered into the record in this case and should be stricken.

practice. Enforcement of a law facially violative of the First Amendment "is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Judge Arnold's dissent properly analyzes why Respondent is therefore liable for enforcing it.

Chief Raftevold's testimony, cited by Judge Arnold, is an "authoritative construction[] of the ordinance," *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 132 (1992). "In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) (citation omitted). Respondent's reliance on Justice Scalia's concurrence in *Crandon v. United States*, 494 U.S. 152 (1990), Brief at 12-13, is misplaced. First, *Crandon* is not a First Amendment overbreadth case. Second, Justice Scalia's statement that the courts do not defer to a prosecutor's interpretation of a statute, *id.* at 177, in no way purports to overrule settled case law about the capacity of a "final policymak[er]" to speak for a municipality. *Jett v. Dallas Independent School District*, 491 U.S. 701, 737 (1989). Any doubt about the capacity of a final decision maker to provide an authoritative construction of a local ordinance is just one more reason for this Court to grant the writ.

### B. As-Applied Unconstitutionality

Perhaps nothing compels this Court's review more than Respondent's discussion of the "as applied" constitutional violations in this case.[3] Respondent characterizes the silent

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[3] Respondent erroneously states that "Petitioners' as-applied claim is foreclosed" due to an alleged failure to appeal the District

prayer walk as "no less focused upon a single residence [than the picketing in *Frisby*], notwithstanding that Petitioners extended their route to the two or three houses on either side of Ms. Bovard's home." Brief at 21. By adopting such reasoning, the Eighth Circuit majority has scrambled the *Frisby* holding beyond recognition. The evil identified in *Frisby* is "to intrude upon the targeted resident, and to do so in an especially offensive way." *Frisby*, 487 U.S. at 486. Bovard's mere presence along the route does not automatically convert the prayer walk into proscribable "focused" picketing. "*Frisby* does not say that picketers lose the shelter of the First Amendment whenever their activity is 'directed at a specific occupant of a building[.]'" *Veneklase v. City of Fargo*, 248 F.3d at 750 (Arnold, J., dissenting). App. A21. "It is true that [Bovard] lived in one of the houses along the protesters' path, but such a fact alone cannot be used to prohibit the Defendants' activity." *Veneklase v. City of Fargo*, 904 F.Supp. 1038, 1050 n.11 (D.N.D. 1995) (quoting and adopting statement of county court). *Accord Vittitow v. City of Upper Arlington*, 43 F.3d at 1106-1107

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Court's decision on that point. Brief at 17. After *Veneklase v. City of Fargo*, 78 F.3d 1264 (8th Cir. 1996) (*Veneklase I*), there was no final appealable order until Petitioners obtained damages from a jury in August 1997. Respondent appealed that judgment, and Petitioners in their Eighth Circuit appellate brief asserted several alternative grounds for affirmance, including a prominent discussion of the as-applied *Frisby* violations now before this Court. *See* 8th Cir. Internal Operating Procedure F(1). "[T]he issue of the liability of the City of Fargo for the unconstitutional enforcement of the ordinance . . . exists in plaintiffs' initial briefs as an alternate ground for affirmance by the court." *Veneklase v. City of Fargo*, 248 F.3d 738, 742 (8th Cir. 2001). App. A5-6. This as-applied *Frisby* issue is therefore fully preserved for this court's review, as both the en banc majority and Judge Arnold's dissent acknowledge. *Id.* at 752. App. A23.

(mere fact that police "can discern one residence as being the target of picketing" does not, without more, engage the ordinance).

The perceptions about how *Frisby* governs this case differ in the extreme. Petitioners agree with the District Court that walking in silent prayer on the public sidewalk in front of an entire block of houses is "as accommodating to residential privacy interests as any picket could be." *Veneklase v. City of Fargo*, 904 F.Supp. at 1050. Respondent, however, equates a silent prayer walk with the "devastating effect," Brief at 15, of the far more intrusive "targeted picketing" described in *Frisby*. *Id.* at 486-87. Respondent also views the prayer walk as "a directed protest" at "an unwilling listener captive in her home." Brief at 16. The en banc majority agrees that the silent prayer walk constituted "focused residential picketing," App. A15. Judge Arnold and the four other dissenting judges, on the other hand, are bewildered about "what kind of constitutional difficulties the *Frisby* court could have had in mind," App. A25, if Petitioners' non-intrusive route can still be criminalized.

Respondent mischaracterizes *Douglas v. Brownell*, 88 F.3d 1511 (8th Cir. 1996) as "upholding [a] residential picketing ordinance that proscribed targeted picketing of residence when protestors extended course to three houses on each side of target as narrowly tailored." Brief at 21. The *Brownell* ordinance in fact limited picketing only "in front of or within one house on either side of a residence or dwelling." *Id.* at 1514 n.5. The Eighth Circuit described this as a "three-house zone." *Id.* at 1520. Moreover, the *Brownell* ordinance otherwise accommodated residential picketing — contrary to how Fargo applied *its* ordinance to arrest anyone who would not leave the neighborhood. Furthermore, whether a differently-written ordinance might be constitutional beyond a one-house zone is not relevant to *this*

case. *See Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 135 (6th Cir. 1994) (where ordinance under consideration is "virtually identical" to one construed by Supreme Court, district court is "bound to adhere to specific result of that case"). Thus, *Brownell* does not help Respondent.

That the parties in this case, and the many lower court judges who have reviewed it, could have such differing views about how *Frisby* governs an expansive silent prayer walk compels this Court's review.

## IV. Municipal Liability

The error of the Eighth Circuit majority in equating qualified immunity with municipal immunity, Petition at 18-20, is passed over in silence, and therefore conceded, by Respondent, which instead stresses "failure-to-train" and "deliberate indifference" mechanisms that are unnecessary when the ordinance itself — the City's codified policy — is the moving force behind the arrests. *See Board of Bryan County Comm'rs v. Brown*, 520 U.S. 397, 404-05 (1997); *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978).

Tracking the Eighth Circuit majority, Respondent argues the municipal liability issue as if it turns exclusively on a "failure to train" theory, and then concludes that the qualified immunity opinion in *Veneklase I* forecloses that issue, a theory this Court has never adopted. Still, the facts unquestionably *do* support "failure to train" liability due to the pervasive indifference of Fargo policymakers both before and after the arrests. After acting on a perceived need by passing Fargo's anti-picketing ordinance in 1985, the policymakers failed to train Fargo's police about enforcement issues: (1) after the ordinance was passed but before *Frisby*;

(2) after *Frisby*; (3) after the *Copper*[4] and *Veneklase* plaintiffs were arrested eight weeks apart in 1991; and (4) after criminal charges against both groups were dismissed on *Frisby* grounds by a state court judge in 1992. Six months after this *Frisby*-centered litigation commenced, policymaker Raftevold testified that he had no intention of training his officers about *Frisby* issues, and then ratified the arrests of Petitioners while reaffirming his belief that a picket route passing in front of 100 houses could be banned under the ordinance. That the dubious qualified immunity analysis in *Veneklase I* has been employed to vindicate Fargo's recalcitrant city government as well is just one more disturbing aspect of the Eighth Circuit's jurisprudence.

Deliberate indifference aside, Judge Arnold's citation to cases which upheld the assessment of damages against municipalities for arrests made pursuant to an unconstitutional ordinance is directly on point. App. A26. Fargo is liable for these arrests, regardless of the qualified immunity of its officers.[5] "Where, as here, a local police officer enforces an unconstitutional ordinance, relief lies against the city." *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994), citing *Monell* at 694.

The overriding principle, regardless of whether the

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[4] Contrary to Respondent's statement, Brief at 20, Petitioners were not the first persons arrested under the ordinance. *See Copper v. City of Fargo*, 184 F.3d 994 (8th Cir. 1999) (picketers arrested on August 20, 1991).

[5] Because the denial of certiorari in *Veneklase I*, 519 U.S. 867 (1996), has no precedential value, *Teague v. Lane*, 489 U.S. 288, 296 (1989), the Eighth Circuit's determination that the scope of the right recognized in *Frisby* was not "clearly established" in 1991 is fully reviewable for purposes of the municipal liability determination.

constitutional violation is premised on facial or as-applied overbreadth and regardless of the "failure to train theory," is that Fargo's official policy — the ordinance itself — was the sole moving force behind the arrests. Lacking any training, Lt. Holman relied solely on the text of the overbroad ordinance as written when deciding to make the arrests. Fargo policy as written, intended, and later interpreted and ratified, was therefore the sole moving force behind the violations. With or without Respondent's conclusive Rule 36 admissions, App. M, *Monell* liability is established on these facts.

## V. Conclusion

Redefinition of *Frisby* is solely the prerogative of this Court, not of a subsidiary tribunal. *Agostini v. Felton*, 521 U.S. 203, 237 (1997). Petitioners were unconstitutionally arrested for walking a route clearly protected by *Frisby*; the City of Fargo is liable for these arrests by reason of its enforcement of an ordinance which is facially unconstitutional without *Frisby's* limiting construction, and was the sole moving force behind the arrests. To maintain this Court's control over its own precedents and to preserve the First Amendment rights protected by *Frisby*, the writ of certiorari should be granted.

Respectfully submitted,

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